

VERBATIM ¹RECORD OF TRIAL ²

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

(Social Security Number)

PFC/E-3

(Rank)

Headquarters and

Headquarters Company,

United States Army Garrison

(Unit/Command Name)

U.S. Army

(Branch of Service)

Fort Myer, VA 22211

(Station or Ship)

By

GENERAL

COURT-MARTIAL

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

Date or Dates of Trial:

23 February 2012, 15-16 March 2012, 24-26 April 2012, 6-8 June 2012, 25 June 2012, 16-19 July 2012, 28-30 August 2012, 2 October 2012, 12 October 2012, 17-18 October 2012, 7-8 November 2012, 27 November - 2 December 2012, 5-7 December 2012, 10-11 December 2012, 8-9 January 2013, 16 January 2013, 26 February - 1 March 2013, 8 March 2013, 10 April 2013, 7-8 May 2013, 21 May 2013, 3-5 June 2013, 10-12 June 2013, 17-18 June 2013, 25-28 June 2013, 1-2 July 2013, 8-10 July 2013, 15 July 2013, 18-19 July 2013, 25-26 July 2013, 28 July - 2 August 2013, 5-9 August 2013, 12-14 August 2013, 16 August 2013, and 19-21 August 2013.

¹ Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

² See inside back cover for instructions as to preparation and arrangement.

DIRECT EXAMINATION

Questions by the assistant trial counsel [CPT MORROW]:

Q. You are Professor Yochai Benkler of Cambridge, Massachusetts?

A. I am.

Questions by the civilian defense counsel [MR. COOMBS]:

Q. Professor Benkler, good morning.

A. Good morning.

Q. I want to start off by getting some background information on you. You are the Berkman Professor for Entrepreneurial Legal Studies at the Harvard Law School?

A. Yes, I am.

Q. You are also the faculty co-director for the Berkman Center for Internet & Society at the Harvard Law School?

A. I am.

Q. In 2011, you authored an article entitled: "A Free Irresponsible Press, WikiLeaks and the Battle Over the Soul of the Networked Fourth Estate."

A. I did.

Q. Sorry about butchering that title for you.

A. It's much too long, I assume.

Q. Now, this article was subsequently published in the Harvard Civil Rights, Civil Liberties Law Review; is that correct?

1 A. It was.

2 Q. And as part of that article, did you conduct research on
3 WikiLeaks?

4 A. I did.

5 Q. Did you also conduct research on the reaction to the
6 disclosures in this case?

7 A. I did.

8 Q. And during your research for your article, did you review
9 any documentation concerning the WikiLeaks media organization?

10 A. Yes, I did.

11 Q. And was one of these documents the Army's
12 counterintelligence report on WikiLeaks?

13 A. It was the version that was then publicly available.

14 Q. Professor Benkler, are you prepared today to tell us about
15 the historical background of the WikiLeaks media organization, the
16 nature of the reaction to the WikiLeaks publication and your review
17 of the Army counterintelligence report?

18 A. I am.

19 Q. Let's begin by learning a little bit more about you and
20 your background.

21 You obtained your bachelor's of law degree from Tel
22 Aviv University?

23 A. I did.

1 Q. And when did you obtain that degree?
2 A. 1991.
3 Q. You then obtained your *juris* doctorate degree from Harvard
4 Law School?
5 A. I did.
6 Q. And when did you attain your degree from Harvard?
7 A. 1994.
8 Q. Afterwards you were a law clerk to Justice Stephen Breyer
9 of the United States Supreme Court?
10 A. I was.
11 Q. When did you clerk for Justice Breyer?
12 A. The October '95 term.
13 Q. You then became an assistant and subsequently an associate
14 professor of law at the New York University School of Law?
15 A. I was.
16 Q. And how long did you teach there?
17 A. About 7 years.
18 Q. What subjects did you teach at NYU?
19 A. I taught communications law, internet law and policy,
20 intellectual property as well as the first year property course.
21 Q. You were then subsequently a professor of law at Yale?
22 A. I was.
23 Q. And how long were you professor of law at Yale?

1 A. Four years.

2 Q. What did you teach at Yale?

3 A. Roughly the same subjects, minus property plus intellectual
4 property.

5 Q. When did you become a member of the Harvard Law faculty?

6 A. In 2007.

7 Q. What subjects do you teach at Harvard?

8 A. The same subjects I've been teaching for 17 years, the
9 whole range of communications law, intellectual property, selective
10 problems and internet law and policy, et cetera, and property.

11 Q. How many books have you published?

12 A. Three.

13 Q. How many articles have you published?

14 A. About 50.

15 Q. Your articles, they've appeared in prominent journals?

16 A. Yes. *The Yale Journal, The Harvard Journal of Law*
17 *Technology, Harvard Civil Liberties Journal, NYU Law Review, et*
18 *cetera.*

19 Q. I imagine your articles have been cited often?

20 A. I hope so.

21 Q. And are you aware of how many times your articles have been
22 cited?

1 A. It's hard to tell. Google Scholar has something over 4,000
2 cites for my book Wealth Of Networks; about 1600 cites for Coase's
3 *Penguin*, which is one article, so some number of thousands of times
4 in law reviews and elsewhere.

5 Q. And my understanding of citing basically that would be kind
6 of peer review where people would cite you for a proposition?

7 A. Yes, yes. There was a study in 2012 that found two of my
8 articles as -- one from '99, one from 2002, as the second most cited
9 law article in any subject on law for that year.

10 Apparently a piece of mine was published last year on
11 the political blogosphere is going to be identified as the best
12 article on Political Science and Technology published in 2012. Those
13 are the kind of peer assessments we get.

14 Q. You also received a \$100,000 award from the Ford Foundation
15 for your work in the field of internet freedom and access; is that
16 correct?

17 A. Yes, I did.

18 Q. And what was that award for?

19 A. This was on the occasion of Ford Foundation's 75th
20 anniversary. They recognized several people they described as
21 visionaries for understanding certain domains and seeing how they
22 change the future and this was for my work on internet and open
23 access.

1 Q. You also speak at conferences?

2 A. I do.

3 Q. And how frequently?

4 A. Probably about once a month, maybe 10 times a year.

5 Q. And in general, what are the topics that you speak about?

6 A. The range of my research, ranging from basic spectrum
7 policy, wireless policy all the way to network society, network
8 innovation. But also, obviously, networked forth estate, the future
9 of journalism.

10 Q. You received a Lifetime Achievement Award from Oxford?

11 A. I did.

12 Q. When was this?

13 A. In 2012.

14 Q. When did you become the faculty co-director for the Berkman
15 Center for Internet & Society at Harvard?

16 A. I was asked to become faculty co-director as soon as I
17 joined the faculty in 2007.

18 Q. Can you tell us what the Berkman Center's mission is?

19 A. The Berkman Center is one of the premier centers. It's a
20 university-wide center. It's a center intended to provide for cross-
21 disciplinary research on internet and the society, the effects on the
22 internet and society and vice versa.

23 Q. When was the Berkman Center established?

1 A. Formally in '98 with a gift from the Berkman Foundation.
2 It has its roots in the center founded by Professors Nesson and
3 Zittrain in '96 at the law school and then it became university-wide
4 center in 2008, soon after I arrived.

5 Q. And what sort of issues does the Berkman Center research?

6 A. It really researches a broad range of issues that are
7 pertinent to the net. We have probably the most authoritative
8 technical study of censorship and filtering, technical analysis of
9 censorship and filtering throughout the world. We have a group
10 working on digital media, and youth, that is one of the leading
11 centers for studying the effects on youth, to a wide range of things
12 I do with my own groups. The Federal Communications Commission asked
13 me to do a review of broadband policy when they were preparing their
14 national broadband plan that resulted in a 330-page review. Work on
15 wireless spectrum policy that resulted in my being asked to join the
16 Spectrum Task Force report of the President's Council of Advisers on
17 Science and Technology on Spectrum. Work on distributing innovation
18 and reorganization of information production and the network, which
19 is probably why I'm on the World Bank's Knowledge Advisory
20 Commission. And as well as obviously work on the network public
21 sphere and collaboration, we have a big project with Central Pacific
22 Media at MIT trying to map and study generally the networked public

1 sphere debate on the net but also specifically the various models of
2 journalism and interactions.

3 Q. And can you tell the Court about the World Bank? You
4 mentioned that you are on the World Bank Organization?

5 A. So this is -- this is merely an advisory commission, as the
6 bank is trying to understand both its own dynamics of research and
7 innovation internally and respond to changes in innovation and
8 research throughout the world.

9 Q. And how does the Berkman Center advance its research
10 mission?

11 A. We have a large number of affiliate and faculty from both
12 the university itself and other institutions. We have several dozen
13 fellows who are research fellows doing work in collaboration with
14 each other or individually. We have a large number of research staff
15 and research assistants and research platform both technical and in
16 the social sciences. And we have a series of seminars and workshops
17 and research teams that apply these diverse methods to various
18 questions.

19 Q. During the time that you have been there, have you ever
20 conducted any research and writing on what is called the Networked
21 Fourth Estate?

22 A. Yes, absolutely. I've been working for generally on the
23 influence of the internet on democracy essentially since the mid 90s.

1 My 2006 book, "Wealth of Network, How Social Production Transforms
2 Markets and Freedom," was in general about the change in models of
3 information production. I had two chapters essentially dedicated to
4 the question of changing in politics and changing in the public
5 sphere.

6 Part of that was understanding how we come to know things
7 in the public sphere and essentially what is the future of journalism
8 as it were. I then began to focus for explicitly after 2009 on
9 network journalism and the effects of networking journalism.

10 Q. And the book that you mentioned, "The Wealth of the
11 Networks, How Social Production Transforms Markets and Freedom," did
12 that book receive any recognition?

13 A. Yes, it did. It received a couple of -- well, several
14 awards.

15 Q. Can you tell the court about some of those awards?

16 A. It was -- it was designated the best book on science,
17 technology and politics published in three years by the American
18 Political Science Association. It received a Distinguished Book
19 Award from the American Sociological Association about sociology and
20 technology and a number of other things I mentioned, in
21 communications business.

22 Q. Now, this book, has it been translated, my understanding
23 has it been translated in at least four different languages?

1 A. It's been translated into the major romance languages,
2 Spanish, Italian and French, Polish, Macedonian, yes.

3 Q. And you mentioned that you received an award from the
4 American Political Science Association. What is that association?

5 A. That's the premiere professional association of academic
6 political scientists.

7 Q. And then I think the other one was the American
8 Sociological Association?

9 A. Similarly, that's the premiere association of professional
10 academic sociologists.

11 Q. Did there come a time when you began to specifically focus
12 on the Networked Fourth Estate?

13 A. Yes, early 2009 there came a substantial new degree of
14 interest in the influence of the network on journalism. It's a very
15 similar phenomenon to what we saw in software in the late 90's, what
16 we saw in music in the early 2000s, what we saw in video in the mid
17 2000s. Traditional journalism began to take notice. There was a
18 Federal Trade Commission hearing that I was invited to talk to about
19 that question of the future of journalism that was trying to
20 understand whether there were policy interventions. So this became a
21 time when it was publicly significant or I was invited to come talk
22 about it and I began to spend more time specifically on the model of
23 journalism and its interaction with the network.

1 Q. Can you give a -- a general, I guess, description for what
2 is the Networked Fourth Estate?

3 A. The Networked Fourth Estate is the set of practices,
4 organizing models, technologies, that together come to fill the role
5 that in the 20th Century we associated with the free press.
6 Essentially the cluster -- if we think of the Fourth Estate as the
7 way in which the press provides a public check on the three classic
8 branches of government. The Networked Fourth Estate is essentially
9 the cluster of practices, technologies and organizations that fill
10 that role in the 21st model of network information production.

11 Q. And how do issues involving the Networked Fourth Estate fit
12 into the Berkman Center?

13 A. Oh, they're absolutely central. We study, perhaps more
14 importantly than anything else, the ways in which the internet
15 affects democracy and the basic question of how the media and the
16 Fourth Estate relates to the network is absolutely central. We
17 actually have just now gotten funding for a major portion in this
18 area in collaboration with MIT's civic media lab. So it's absolutely
19 central to the Berkman Center's mission.

20 Q. Professor Benkler, let's discuss the article that you wrote
21 on the network of the fourth estate, specifically dealing also with
22 WikiLeaks in more detail. Okay?

23 A. Yes.

1 Q. I'm showing you what has been marked as Defense Exhibit
2 Golf for Golf-Golf Identification [handing DE GG for ID to the
3 witness]. Do you recognize that?

4 A. I do.

5 Q. And what is that?

6 A. That is the article that I published in the *Harvard Civil*
7 *Liberties Review*.

8 Q. When was that article published?

9 A. Mid 2011.

10 Q. When did you begin your research for this article?

11 A. In April of 2010, right after the release of the helicopter
12 video.

13 Q. The Apache video charged in this case?

14 A. Yes.

15 Q. When you began your research, what did you set out to
16 investigate?

17 A. Well, I was intrigued. When this came out it was clear
18 that Reuters had been trying to get access to the footage for 2 years
19 in traditional means. This seemed like an interesting connection
20 between network models and traditional media.

21 It was a success where the traditional model, one of its
22 most famous practitioners, writers, was unable to get the information
23 in terms of retrieving the material. And it was released by the

1 National Press Club which provided a very interesting bridge between
2 new media and old media.

3 So the combination of these things intrigued me and I
4 thought it would be a very good case study for how new network models
5 are beginning to interact more formally with the traditional models,
6 so that's when I started working on this.

7 Q. And you said that it was released, the Apache video was
8 released within the National Press Club?

9 A. Yes.

10 Q. Can you talk about that just for a second?

11 A. So ----

12 Q. Like what is the National Press Club?

13 A. It's a location and organization in Washington, D.C. that
14 in many senses represents the core of the establishment of
15 traditional journalism, so it was that incongruity as it were between
16 a completely distributed model and the core representation location
17 of traditional media that I found so interesting.

18 Q. And can you tell us about the research that you conducted
19 for this article?

20 A. You mean what did I do in terms of research?

21 Q. Correct.

22 A. This is primarily reading a lot of news reports, over a
23 thousand; online research to see what was written online; historical

1 views; historical searches that are time limited in order to see what
2 prior things have been written; internet archive views of the
3 WikiLeaks site itself to see if the message had significantly changed
4 over time; looks at the history of Wikipedia articles to see how it
5 was understood on Wikipedia over time; those kinds of materials.

6 Q. These types of materials and sources, are they typically
7 relied upon by academic professionals in your field?

8 A. It's one of the methods we use. I also use other methods
9 as well, but certainly this sort of first draft of history, looking
10 at a lot of publicly available written materials is one important
11 method that we use when we try to understand broad trends,
12 particularly when we try to understand the qualitative substance
13 rather than providing merely quantitative thinner representations,
14 yes.

15 Q. How long did you spend researching for this article?

16 A. About 8 months until the very last version in March 2011,
17 at the end of the editorial process, so about 8 months. I kept
18 researching obviously because, though I didn't expect it, when I
19 started working, it became a much more live subject by the time I had
20 finished working on it.

21 Q. And did you conduct any research to learn about the
22 WikiLeaks journalistic organization?

23 A. Yes.

1 Q. What did you review to learn about WikiLeaks?

2 A. Roughly the same kinds of materials.

3 Q. And can you describe the, basically in broad brush, the
4 type of materials that you considered to learn about WikiLeaks?

5 A. Again, a wide range of -- a wide range of news articles to
6 see how it was portrayed, a wide range of online materials. I'd say
7 the one additional piece was when I published the very first draft of
8 the article or didn't publish -- when I put it up online, which I
9 often do in order to get commentary from people so I can improve it.

10 I got an e-mail from Julian Assange with a variety of
11 annotations where I was right, where I was wrong, where there was
12 more material. I used that much the way that I would use information
13 from an interviewee in a more interview based model of research. So
14 to some extent, as the footnotes in the article show, I describe it
15 as Assange says so-and-so in this and this particular portions of the
16 annotations. In some places it sent me back to do more research
17 where he raised ambiguities or disagreed with other sources,
18 characterizations of the events and I just used it as an impulse to
19 go into more research of the same kind.

20 Q. And are these sources typically relied upon by academic
21 professionals in your field?

22 A. Yes, I think they are.

1 Q. Based upon your research, did you reach any conclusions as
2 to how WikiLeaks fit into the Networked Fourth Estate?

3 A. Yes, I did.

4 Q. Did you also study and learn about the historical
5 background of WikiLeaks, how it was viewed at one particular time and
6 how it is currently being depicted?

7 A. Yes, I did.

8 Q. And based upon your research study and writing on this
9 topic, did you ultimately reach any conclusions regarding WikiLeaks
10 and how it fit within the Networked Fourth Estate?

11 A. Yes, I did reach that conclusion. The article was -- this
12 article has been, as best I can tell, the most widely cited academic
13 article on WikiLeaks, at least according to Google Scholar.

14 Q. In comparison to other articles, how many more times has
15 this been cited just in double or triple?

16 A. So this article, again, based on Google Scholar has been
17 cited about twice as often as the next most cited source which is Lee
18 Harding book "Inside WikiLeaks" which was written by the true
19 Guardian reporters who work on the publication of these materials.
20 And this article has been cited almost twice as often.

21 Q. And, again, when people cite your article, is that how peer
22 review is done in your field?

1 A. It's certainly considered a standard measure of influence
2 of an article, the degree to which people say, this is what I rely on
3 for the best assessment of this or that issue, yes.

4 CDC[MR. COOMBS]: Your Honor, at this time the defense would
5 request the Court recognize Professor Benkler as an expert in the
6 subject matter of the Networked Fourth Estate. We intend to use that
7 expertise then to specifically testify about how WikiLeaks fits
8 within the Networked Fourth Estate.

9 ATC[CPT MORROW]: One moment, Your Honor.

10 Your Honor, I'd like to examine briefly.

11 MJ: Go ahead.

12 **VOIR DIRE**

13 **Questions by the assistant trial counsel [CPT MORROW]:**

14 Q. I want to start by asking you about the Networked Fourth
15 Estate. Is that a term that you coined?

16 A. Yes, it is.

17 Q. Can you -- when did you coin that term?

18 A. Possibly in this article.

19 Q. So this is a -- prior to summer of 2011, when this article
20 was formally published in the *Harvard Civil Liberties Review*, this
21 term had not been used by other people in your field?

22 A. The term had taken hold since the publication of my 2006
23 book was broader, the network public sphere. And that has become

1 more or less a term-of-art in terms of trying to understand the
2 structure of the network and democracy. What I did here was to try
3 to narrow the specifics of focus and that's largely become, I'd say,
4 a fairly normal and standard way of talking about it now.

5 Q. And the Networked Fourth Estate or the Fourth Estate refers
6 to journalism in general?

7 A. Mostly it refers to journalism when we're talking about its
8 role in the construction of democracy, more on the watchdog function
9 specifically around the more broadly journalism.

10 Q. When you put network in front of that, what networks are
11 you talking about?

12 A. I'm talking particularly about the cluster of
13 technological, organizational and practical -- practice-based changes
14 that have been characterized by the shift to the ubiquitous
15 computation, ubiquitous communication, ubiquitous sensing and
16 ubiquitous storage, which is really the set of changes that I've been
17 writing about since the mid 90's. So there's a cluster of typical,
18 organizational changes that we have seen rereleased since software in
19 the mid '90s that are combined with -- that are primarily related to
20 the rise of the internet and have appeared and reappeared in multiple
21 industries over this time that have been affected in this form.

22 Q. How does the -- when you -- When we think about the network
23 sometimes we think about sort of exclusively the internet. How does

1 the -- when you describe the Networked Fourth Estate, are you
2 referring primarily to the internet or are you referring primarily
3 how the internet interacts with other traditional forms or older
4 forms of information distribution? How does that work?

5 A. So essentially what happened with the -- what happened with
6 the introduction of ubiquitous computing is that the core physical
7 resource that we need to be productive in this set of domains became
8 widely distributed in population. The core storage facilities, the
9 core creative human resources, the creativity, the insight became
10 distributed throughout the population. And so to think of it purely
11 in terms of the internet as I think too narrow, that's a lot of what
12 I've been trying to explain in the last 17 years. It's much more a
13 combination not only of the technical side of the internet but also
14 the organizational adaptation.

15 One of the things that's happened is people realize that
16 you can't have all the smartest people and all the resources working
17 in the same organization. So we have seen a much greater
18 distribution in networks that even though they use the internet,
19 what's important about the network structure is actually permissions,
20 who's allowed to work on what resource or assignments of work
21 assignments and you get essentially these organizational networks
22 that transcend traditional boundaries, these resource and permission
23 networks that transcends the boundaries of traditional properties

1 layered over a technological network that actually has the materials.
2 It's really this -- that's why I resist a little bit is describing it
3 just the internet.

4 Q. Right.

5 A. I think it's more layered than that.

6 Q. So really it's more about the -- that was a lot of -- I was
7 trying to follow along. But really it's more -- the network of the
8 Fourth Estate is really about really how information is, what, shared
9 among ----

10 A. It's how it's produced. It's how it's shared. Let me give
11 you an example so it's completely irrelevant so it doesn't influence
12 the course of our material here from research that we're conducting
13 now. Maybe you remember about a year and a half ago there was a
14 major Wikipedia shutdown for a day. There was a major protest over a
15 statute that was introduced, a bill that was introduced in Congress.

16 One of the things that happened there as we have been
17 studying now is that who was producing the information was very
18 different from the traditional model. You had a few commercial sites
19 like Tech Dirt that was incredibly important in doing the initial
20 investigating. You had individual blogs. There is a week in which
21 one of the most visible sites is one law professor writing their own
22 blog doing a core analysis of a new bill. There is a little bit of

1 traditional media, but there's a non-profit organization that writes
2 together with it.

3 So it's this fact that you have very different low side of
4 information production throughout the network, each doing what
5 they're particularly good at and then feeding into what becomes the
6 single understanding that we have that's really what I'm talking
7 about. The internet facilitates it, distributes the computation
8 facilitates it, but it's really this distribution of a sense of who
9 does what and who is accredited to do what and if we used to once be
10 able to turn on the TV and there was Walter Cronkite and that was the
11 way that it was. It simply can't work that way anymore. That's
12 really what I'm talking about.

13 Q. Have you been qualified as an expert before?

14 A. No, I haven't.

15 Q. And so you haven't been qualified as an expert in Networked
16 Fourth Estate?

17 A. When you say qualified, I assume you meant in a courtroom

18 ----

19 Q. In a courtroom.

20 A. ---- in this context?

21 Q. Yes.

22 A. Yes. No. Other people would qualify me as an expert but
23 not in a courtroom.

1 Q. That's what I mean. To your knowledge, has anyone ever
2 been qualified as an expert in a Networked Fourth Estate?

3 A. I have no idea.

4 Q. In a courtroom?

5 A. I have no idea.

6 ATC[CPT MORROW]: Your Honor, this is a distinguished academic
7 and obviously very smart man, but the government's position is that
8 the scope of the Networked Fourth Estate or at least how he's
9 described it now is somewhat unrelated to the -- or disassociated
10 from his opinions about WikiLeaks as a, whether or not they're a
11 journalist organization.

12 MJ: I'm not quite sure I understand that.

13 ATC[CPT MORROW]: Well, I'm not quite sure I understand the
14 Networked Fourth Estate, but ----

15 MJ: Am I understanding you correctly in saying that you're
16 basically looking at, you know, in the last century traditional news
17 media and the way people got news was through newspapers. Before
18 that, I don't know, a telegram or something like that. As technology
19 evolved, now you're getting more people on the internet that are
20 sharing things?

21 WIT: That's at the core of it.

22 MJ: But you're studying the evolution of how people get news or
23 develop news?

1 WIT: Yes. Yes.

2 MJ: I understand your objections to potential opinions that may
3 be given but the scope of the expertise in developing new technology,
4 or new ways of communicating, if you will. What's the government's
5 objection to it?

6 ATC[CPT MORROW]: We have no objection to rendering any
7 opinion in that sense.

8 MJ: Well, I assume, Professor Benkler is going to be testifying
9 about how WikiLeaks fits into news Networked Fourth Estate.

10 ATC[CPT MORROW]: That's correct. I guess you can see how the
11 testimony goes and we can raise additional objections to relevance as
12 they come.

13 MJ: All right. I'll go ahead and accept him as an expert in
14 that area. But I will be ensuring that the testimony that's given is
15 relevant.

16 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

17 Q. Professor Benkler, let's start off by talking about your
18 research on WikiLeaks. Okay?

19 A. Yes.

20 Q. How was WikiLeaks formed?

21 A. As best we know from the available documents on the site
22 itself, it describes itself as a collection of Chinese activists,

1 mathematicians, journalists from several other countries who came
2 together in order to create a platform for providing transparency.

3 Q. When did WikiLeaks become an online presence?

4 A. WikiLeaks began -- WikiLeaks the domain name is registered
5 in late 2006. The first sample document was placed online in
6 December of 2006, with the supposedly secret Somali court order. But
7 that's more rumor and early moves. The first real instance of a
8 genuine leak is in August of 2007, with the publication of an
9 independent -- of an independent report on corruption in the
10 government of Daniel arap Moi in Kenya.

11 And then later on -- later in 2007, with the publication of
12 the Camp Delta operating procedures in November of 2007.

13 Q. Based upon your research, what type of organization is
14 WikiLeaks?

15 MJ: At what time period?

16 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

17 Q. At any time period.

18 A. WikiLeaks is a ----

19 ATC[CPT MORROW]: Objection, Your Honor.

20 MJ: Yes.

21 ATC[CPT MORROW]: We would ask that the scope of his testimony
22 be limited to the time period from 2007 to March 2010.

1 MJ: Is the government going to go forward in cross-examination
2 on any future time period?

3 ATC[CPT MORROW]: Future?

4 MJ: Future time period with WikiLeaks?

5 ATC[CPT MORROW]: It's limited to that.

6 MJ: What is the relevance of what it is after the charged
7 offenses and publications?

8 CDC[MR. COOMBS]: I think the relevance is because the
9 government's theory in this case is by giving information to
10 WikiLeaks, PFC Manning gave information to the enemy. They charged
11 that after the March of 2010 timeframe. They've also charged him
12 with wanton disclosure of classified information ----

13 MJ: Getting rid of the March timeframe. With respect to
14 relevance of WikiLeaks through the period of publication of whatever
15 the government is alleging that PFC Manning gave, what is the
16 relevance of what they're like after that?

17 CDC[MR. COOMBS]: The Defense's position is the relevance
18 after that time period goes into really how the government has
19 charged the case or how they're trying to portray WikiLeaks as an
20 organization that would provide information to the enemy or somehow
21 not a legitimate journalistic organization. That type of argument
22 has only been advanced after the March 2010 time period. And

1 Professor Benkler will testify how WikiLeaks was viewed prior to
2 this.

3 MJ: I understand that. I'm just looking at beyond the
4 publications of the charged documents so, for example, WikiLeaks now,
5 WikiLeaks in 2012, what's the relevance?

6 CDC[MR. COOMBS]: Well, again, the idea of WikiLeaks as being
7 anything but a legitimate journalistic organization that was
8 advancing transparency, was not anti-American, was not aiding the
9 enemy in any way, shape or form or designed to do that, was not an
10 organization that the enemy went to. The government has introduced
11 evidence, subsequent to March of 2010, where they're saying, well,
12 you know, Osama Bin Laden asked people to go to WikiLeaks to pull
13 information. That's subsequent to March 2010.

14 The government's whole argument seems to be premised on
15 creating WikiLeaks as a bad organization, as Julian Assange as a bad
16 person. That whole train of thought is created really after March of
17 2010. It's created by big government and how they reacted to the
18 releases in this case and how they reacted -- and Professor Benkler
19 will testify how they reacted in a very uneven-handed manner where
20 you have other organizations like the *New York Times*, like *The*
21 *Guardian*, like *Der Spiegel*, publishing the same information and yet
22 the diatribe coming from the government was not aimed at them, it was
23 aimed at WikiLeaks.

1 So the government in their case has introduced evidence as
2 to how the enemy apparently viewed WikiLeaks after March 2010. That
3 even when you look at that evidence and the Court does, you'll see
4 that the request for that information wasn't because of the enemy
5 saying, "Hey, we need to go to WikiLeaks to get this." When you look
6 at that document -- I can get the exact Prosecution Exhibit, the
7 individual says, due to the government's response, and I believe it's
8 the Secretary of Defense's response, claiming that WikiLeaks is
9 aiding the enemy, we need to go look at this documentation, go pull
10 these documents for us.

11 So that is why the defense believes Professor Benkler
12 should be allowed to talk about how that trend changed from viewing
13 WikiLeaks as a source of legitimate journalistic information, and
14 he'll also testify that they received awards on internet freedom and
15 index on internet freedom for its work, to now being public enemy
16 number 1, and trying to lump my client with that in order to
17 bootstrap in some argument that there was an aiding of the enemy.

18 MJ: Go ahead with your questioning and I'll take the questions
19 as they come. Go ahead.

20 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

21 Q. So Professor Benkler ----

22 TC[MAJ FEIN]: Ma'am, can the government still be heard on this?

23 MJ: Go ahead.

1 ATC[CPT MORROW]: We'll make a couple of brief points, Your
2 Honor. The charged offenses were completed in May -- up to May 2010.

3 MJ: The publications were later.

4 ATC[CPT MORROW]: That's correct, Your Honor, but the wanton
5 piece refers to PFC Manning's actions wantonly caused to be
6 published. Everything refers to PFC Manning's actions. What the
7 defense is referring to is now, you know, first of all there's no
8 evidence that PFC Manning knew any of this, which speaks to the
9 relevancy of this entire thing. But, again, the actual completed
10 offenses happened in May 2010. That should be the relevant
11 timeframe, up to May 2010, if we're going down the road of what was
12 WikiLeaks and how were they viewed or how were they portrayed, et
13 cetera, or how they viewed themselves.

14 Mr. Coombs mentioned enemy possession. Again, he's
15 conflating the elements. The element is the knowledge of WikiLeaks
16 prior to May 2010. We have to prove possession of the intelligence
17 by the enemy, but that's a separate element entirely.

18 MJ: All right, government, I don't agree. I see the relevance
19 on the type of journalistic organization, if they are a journalistic
20 organization, is relevant to the recklessness if you will. I agree
21 what PFC Manning knew at the time goes to his intent. There's --
22 we'll wait until we get to the questions about government reactions,
23 because I am not seeing the relevance of that. Go ahead.

1 CDC[MR. COOMBS]: Yes, Your Honor.

2 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

3 Q. So let's go back to the question I asked. Prior to --
4 actually, I'm going to move on to what conclusions again did you
5 reach about WikiLeaks as an organization based upon your research?

6 MJ: Is there any foundation for that?

7 CDC[MR. COOMBS]: The research that he did on WikiLeaks, ma'am,
8 that I covered.

9 MJ: All right. Go ahead.

10 **Questions by the civilian defense counsel continued:**

11 A. Based on the research that I have done, I see WikiLeaks as
12 an organization that fulfilled a discrete role in network journalism
13 of providing a network solution to leak-based investigative
14 journalism that in the past was done only by relatively large and
15 unified organizations and now could be done in a network mode. The
16 primary role that I saw WikiLeaks as playing -- so, for example, just
17 to give a little bit of context.

18 In software development what happened with network
19 production is that it used to be all Microsoft or IBM, everything
20 internal. What happened with network production is you got a
21 decomposition of the functions. So, for example, in operating
22 systems you've got a group developing the Linux-Kernel and then
23 you've got a whole bunch of other groups some commercial, like Novell

1 or Red Hat, some non-profit, like the Shuttleworth Foundation, some
2 volunteer networks like Debian, each pulling together that colonel
3 with a bunch of other things to create the operating system that we
4 know as the Linux operating system.

5 WikiLeaks did essentially the same thing. If you imagine
6 the Washington Post finding Deep Throat, creating the conditions of
7 secrecy for the confidential -- for the source, and then being able
8 to protect that source, that required a certain amount of heft. If
9 you think of the Pentagon papers, again you receive it, you do the
10 analysis but you also have the money to go and defend it in court.
11 In the network tremor there are a lot of organizations that don't
12 have the organizational heft to do all of that, but they do have the
13 ability to provide insight. So WikiLeaks, just like Linux-Kernel
14 Development produces a core part of the software; WikiLeaks provides
15 a solution for how network journalism can stabilize leak-based
16 investigative journalism in the face of diminishing newsrooms, much
17 poorer organizations, much less of a well-structured way of defending
18 it in court.

19 So that's what I see WikiLeaks in this context of doing as
20 an organization, providing a discrete but critical component of what
21 in the past was always integrated in a single organization.

1 Q. From your research, how did WikiLeaks then fit in with
2 other journalistic -- did it fit in with the idea of a journalistic
3 organization from your research?

4 A. Yes, absolutely. I think it did.

5 Q. And based upon your explanation there, how did other more
6 traditional journalistic organizations then take advantage of what
7 WikiLeaks was doing?

8 A. So they would take the materials and provide more context,
9 more analysis, integrated into storage, obviously much wider
10 dissemination than WikiLeaks itself did. So if you think of the
11 press's -- if you think of journalism from the mentor function as
12 about gathering of information relevant to public concern and its
13 dissemination to the public, a lot of these other organization spent
14 the time working both on the relevancy and the dissemination, while
15 WikiLeaks did essentially the gathering, the authentication and the
16 initial selection for dissemination to these further analyses.

17 Q. Now, as part of your research, did you look at how
18 WikiLeaks was viewed prior to the releases?

19 A. Yes, absolutely.

20 Q. And how did you do this?

21 MJ: Releases of what?

22 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

23 Q. Prior to the releases charged in this case?

1 A. Among other things, I read every single news report that
2 mentioned the word WikiLeaks from before March 31st, 2010, at least
3 as they appeared on the West Law database, about 700 articles.

4 Q. Prior to 2010, what type of documents did WikiLeaks
5 publish?

6 A. So it published a range of documents. These included, for
7 example, internal documents from the Swiss Bank Julius Baer relating
8 to mechanisms for helping clients use Cayman Islands accounts for tax
9 avoidance. They included materials from the Icelandic bank Kauphing,
10 which apparently had engaged in activities that ended up after the
11 description in WikiLeaks resulting in an investigation of the Serious
12 Fraud Unit in the UK because they had defrauded some local British
13 municipalities just before they bankrupt in 2008, or after the
14 crisis, I mean.

15 They had described, for example -- they had published
16 internet filtering software lists that were used in Australia and
17 Denmark and Norway as antiporn filtering but were extremely crudely
18 designed so that created a significant political backlash.
19 Ironically WikiLeaks itself in Australia was placed within this list
20 but that's a context in which the publication of the list led to
21 public debate, public opposition and eventually the abandonment of
22 the policy.

1 They published a copy of what was then a secret negotiated
2 trade treaty, the anti-counterfeiting trade treaty, that was
3 enormously controversial politically across the 20 countries in which
4 it was proposed. After its publication ultimately it resulted in
5 protests throughout most of the EU member states and European
6 parliament rejected it and wasn't willing to ratify it or at least
7 the member states were not.

8 Then, of course, there were a variety of materials on the
9 U.S. Some of which were reported in the counterintelligence report
10 and some of which I've already mentioned, the Camp Delta operations.

11 Q. Did WikiLeaks have a published mission statement prior to
12 April 2010?

13 A. Yes, they did. They -- their mission statement was
14 primarily focused on exposing corruption and unethical behavior of
15 authoritarian regimes in Asia, former Soviet bloc countries, Africa,
16 sub-Saharan Africa, but in the mission statement they also said they
17 would support exposures of unethical behaviors by people everywhere
18 in every country.

19 Q. And how did WikiLeaks go about trying to expose unethical
20 practices, illegal behavior and wrongdoing within corrupt
21 corporations and governments?

22 A. They created what was essentially a safe platform for
23 people who were close to the materials, who had knowledge on the

1 inside to leak materials for public revelation and the platform was
2 intended both to provide secrecy and security for the person leaking
3 and to provide a mechanism for some level of authentication of the
4 voracity of the documents before they were placed online and in the
5 ideal model also a place for people to comment on the materials after
6 they were made online. Although that was a less significant
7 component at the end of the day of the -- of the site when it
8 actually was in operation.

9 Q. Did WikiLeaks target any specific companies for its leaks?

10 A. It's hard to say that it targeted particular companies. It
11 was more a question of what came in the door that was actually there.
12 As I said, some of the most important corporate issues were not from
13 the U.S.. There was very little that was U.S. specific. There was a
14 document from J.P. Morgan that could have been ----

15 MJ: What time frame are we talking about?

16 A. This is in the 2007 to 2009 timeframe. There was a
17 document from J.P. Morgan that was arguably a how-to on insider
18 trading for clients without getting caught but that was about it from
19 the U.S. side.

20 I'd say the most significant corporate disclosures that got
21 really public attention were the Julius Baer Swiss Bank story. There
22 was a major story in the UK of a Swiss registered UK based oil
23 exploration company, Trafigura, that had an internal engineering

1 report showed that it actually knew that it had dumped toxic waste
2 off the coast of the Ivory Coast.

3 There were several banking related issues. There was one
4 banking related issue with a government bailout of Northrop Bank in
5 the UK, there was Barclay's Bank, there were a couple of Icelandic
6 Banks, as I mentioned the Kaupthing Bank. Those were the type of
7 corporate corruption related things that got attention.

8 Q. And did WikiLeaks target any specific countries for its
9 leaks?

10 A. Formally it targeted -- its primary formal statement was it
11 was particularly interested in authoritarian countries as I said
12 particularly in Asia, sub-Sahara Africa, post-Soviet republics and
13 the Middle East. Realistically, I would say the single most
14 important disclosure from an authoritarian country was the disclosure
15 of the Green Ban program in China. This was a program that was built
16 in China as a way of protecting youth from porn. It was supposed to
17 be -- essentially Chinese PCs were supposed to be impregnated with a
18 filter that would protect children from porn. When the
19 specifications were leaked and released on WikiLeaks, it turned out
20 that the program, in fact, does a lot more censorship than the
21 government wanted and despite the fact that it's not a democratic
22 government, there was sufficient public uproar that the program was

1 abandoned. That was the single most important investigative act that
2 resulted in a really act of authoritarian countries.

3 Obviously the Kenyan -- the report on Kenyan ex-judicial
4 killings that was subject of the award from Amnesty International was
5 another major authoritarian country.

6 I'd say most of the revelations came from completely
7 democratic countries or broadly democratic countries, like Thailand
8 where another internet censorship project was exposed showing, for
9 example, that the government among other things was trying to filter
10 The King and I because of the way -- the old version, because of the
11 way it portrayed the king, and the filtering things that I mentioned
12 before.

13 Q. Based upon those articles, you indicated that WikiLeaks
14 received an award. What awards did WikiLeaks receive?

15 A. WikiLeaks received two major awards. One from the British,
16 the British organization, Index on Censorship, which is a major -- a
17 major organization tracking press freedom throughout the world. And
18 the other was from Amnesty International. The Index on Censorship
19 was 2008, and Amnesty International was 2009.

20 Q. At this point did WikiLeaks have any published statement
21 regarding how it viewed freedom of the press?

22 A. Yes. WikiLeaks -- WikiLeaks had a published statement. It
23 cited essentially -- it was anchored in the Pentagon papers case and

1 its core argument was that the role of the free press is to assure
2 that the government does not deceive its people and that a free press
3 is the only guarantor that the government cannot deceive its people,
4 specifically mentioning a variety of other components of that
5 decision. But that was the core -- the core argument was that
6 transparency was absolutely necessary to good government and to
7 democracy.

8 Q. And based upon your overview of WikiLeaks' activities prior
9 to April of 2010, how was WikiLeaks portrayed online and in print
10 media?

11 A. So I'd say there are somewhere between two and three major
12 periods.

13 The first 6 to 8 months from the launch more or less in
14 late 2006, until the middle of 2007, there's a lot of speculation.
15 For obvious reasons the organization had not really started to
16 function. This is the time in which we see most of the standard
17 responses to any kind of new network organizations. Very similar to
18 what we saw with free software and how it was described in the late
19 '90s, very similar to what we saw with Wikipedia and how it was
20 described in the early 2000s. And that's essentially, how are we
21 going to get authenticity, how are we going to get responsibility and
22 how are we going to know what the quality is. A lot of speculation.

1 At the time, also I think this was a transition where
2 Wikipedia suddenly became respectful, and I think that's why
3 WikiLeaks picked the name, even though it was completely unrelated.
4 So there was a question of how would people -- how would this thing
5 work? Could anybody look at the documents and then decide. How
6 would we then preserve any kind of anonymity? There was a lot of
7 concern over whether there would be too much exposure and too little
8 authenticity, together with excitement about here's this new model
9 and what was the future of journalism.

10 Once WikiLeaks actually began to operate in mid 2007
11 to late 2007, the narrative shifted quite a bit more towards a
12 whistle blowing organization, a whistle blowing site based on the
13 very small number of leaks that became public at the time. I'd say
14 the major transition point came around the issuance of the injunction
15 in the Julius Baer case in early 2008. And that was the moment at
16 which really WikiLeaks was described widely through the press as a
17 new online journalistic organization.

18 In that case there was an amicus brief filed by the
19 Reporters' Committee on Freedom of the Press, Gannett, Associated
20 Press, the Newspaper Editors Association, all of them filed amicus
21 briefs saying you can't shut this down. *The New York Times* came out
22 with an editorial that basically opened with the words roughly, "New
23 online journalism creates a new front in freedom of the press." It

1 described WikiLeaks as a muck-racking site and analogized explicitly
2 the shutting down of WikiLeaks by the injunction to shutting down a
3 whole newspaper because of an objectionable article. The *LA Times*
4 called it a muck-racking site. The *Economist* described it as --
5 described the process and said there were journalists and lawyers
6 looking at the materials before they were argued under the
7 Distinguished Advisory Board.

8 When WikiLeaks, for example, released congressional
9 research service reports a few months later, Senator Lieberman came
10 out and said we should be doing this and actually praised WikiLeaks
11 substantially. The *Federal Times*, the primary paper for federal
12 employees, came out and said WikiLeaks is a site maintained by
13 investigative journalists and transparency fans dedicated to and open
14 and transparent government, described it in these terms. Obviously
15 there were many stories, some of them less explicit, but that's the
16 tenor that essentially began to emerge from Julius Baer and then
17 later on throughout 2008 and really throughout much of 2009.

18 Q. Prior to April of 2010, in your research did you see
19 anything to connect WikiLeaks with a terrorist organization?

20 A. No.

21 Q. And prior to April 2010, did you see anything to connect
22 WikiLeaks with any sort of terrorist groups providing information to
23 terrorist groups?

1 A. No.

2 Q. I now want to ask you a few questions about how the
3 portrayal of WikiLeaks began to change after they started publishing
4 certain documentation charged in this case. Okay?

5 A. Yes.

6 Q. Did the portrayal of WikiLeaks start to change in 2010?

7 A. It did. Substantially.

8 Q. And when did this change begin?

9 A. I'd say the primary shift occurs around the -- concomitant
10 with the release of the Iraq war logs later in 2010.

11 Q. Now ----

12 A. That's the portrayal in the media. Then there's a public
13 response earlier than that after the release of the Afghanistan war
14 logs.

15 Q. We'll talk about this in a moment. But I want to backtrack
16 just for a second and go back to your article. One of the things
17 that you considered in your article was a 2008 Pentagon report?

18 A. Yes.

19 CDC[MR. COOMBS]: I'm handing the witness what has been marked
20 as PE 45 -- what is PE 45 [handing PE 45 to witness].

21 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

22 Q. Do you recognize that?

23 A. I do.

1 Q. What is that?

2 A. This is the unclassified version of the report that I

3 looked at as part of my research for this article.

4 Q. And based upon your review of this article, what was the PE

5 45 largely based upon?

6 A. It was largely based on reading the WikiLeaks site itself

7 and on other open source materials, perhaps some news stories,

8 perhaps some research online.

9 Q. Did you see anything in the report that you couldn't also

10 find in unclassified reporting on the internet?

11 A. Probably two things. There were ----

12 Q. Before you talk about that, are those two things currently

13 now in that document?

14 A. Yes.

15 Q. Are any of those things in a footnote?

16 A. No.

17 Q. Okay. So what were the two things?

18 MJ: Hold on. Yes?

19 ATC[CPT MORROW]: Objection. Relevance.

20 MJ: What is your question?

21 CDC[MR. COOMBS]: My question was: Did he find anything in

22 this document that was not already available in open source

23 information? The relevance part I'm going to talk about is how this

1 article, which I believe the government is using PE 45 to claim that
2 PFC Manning should have known from this that he would have actual
3 knowledge that he was giving information to the enemy. I'm going to
4 use Professor Benkler to describe the content of the document.

5 MJ: I can read the content of the document. Why do you need to
6 do that?

7 CDC[MR. COOMBS]: That's granted that you could, Your Honor,
8 but Professor Benkler will talk about where the content of the
9 document came from which I don't know if the Court would know that
10 intuitively from looking at the document and also explain, you know,
11 basically some of the logical leaps in that document.

12 MJ: I'll let you go and talk about the document and what was in
13 open sources. That's relevant.

14 CDC[MR. COOMBS]: Okay, Your Honor.

15 MJ: I see the questions as they continue, go ahead.

16 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

17 Q. So we actually don't really need to talk about the two
18 items in particular. So based upon ----

19 A. Basically it was almost all open source material.

20 Q. Did you see anything in this document that supported the
21 idea that WikiLeaks provided information to the enemy?

22 A. No. What there was here were theoretical statements about
23 how the enemy could come and use this. Particularly with a

1 particular emphasis on how the enemy could try to use it for
2 propaganda to inject false information and have perceptual
3 management. But no real -- other than speculation, no evidence that
4 there had actually been any use by any enemy.

5 Q. Did the 2008 Pentagon report cite any evidence to suggest
6 that the enemy, in fact, went to WikiLeaks?

7 A. No, there was no evidence here that anyone had actually --
8 that any enemy had in fact used WikiLeaks.

9 Q. In general, how would you describe this report?

10 A. Frankly, it was, I thought, a relative mediocre effort ----

11 MJ: I'm going -- this -- this witness is not an expert in
12 intelligence. That is not relevant. Move on, please.

13 CDC[MR. COOMBS]: Your Honor, Defense's position is this is
14 not intelligence. That's why I asked the question whether or not
15 most of this item -- most of the information came from open source.
16 The Defense's position is if you compared what's in this document
17 with open source information in many regards it's pulled verbatim.
18 So, for example ----

19 MJ: You can ask all of those questions, just not an opinion on
20 the value ----

21 CDC[MR. COOMBS]: The witness is an expert though in what he
22 reviewed and what he reviewed was the open source documentation
23 related to WikiLeaks, in particular to WikiLeaks' website and used

1 this article, this 2008 report, extensively in his article that he
2 published. So he verified -- he verified what was in the information
3 in this article. Everything in here is from open source.

4 MJ: That's fine. Just no opinions on whether it's speculation,
5 whether it's -- he's not qualified to do that.

6 CDC[MR. COOMBS]: The question I was asking him, Your Honor,
7 what was his opinion of this article, if allowed, he would say this
8 article is basically premised solely upon open source information.

9 MJ: That's fine.

10 CDC[MR. COOMBS]: And speculation at that point.

11 MJ: That's fine.

12 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

13 Q. Okay.

14 A. This article was based on open source information. Many of
15 its key judgments were speculative and were not supported by evidence
16 in the document itself. It included as a core statement both in the
17 executive summary and in the body an assertion that WikiLeaks does
18 not engage in any authentication, an assertion that was already known
19 at the time based on publicly available reports to be false, simply
20 mistaken. Because already at the time that this report was created
21 there had already been a major shift in the understanding of how
22 WikiLeaks was authenticating materials from roughly the same period.
23 There's a report in the New Scientist where Steven Aftergood from

1 Federation of American Scientists who had been an early vocal critic
2 of WikiLeaks precisely on the question of lack of authentication
3 comes back and says, look, there are lots of leaks sites. What
4 WikiLeaks has done is to professionalize the model of intake,
5 selection and authentication. This is a time at which only a month
6 later the *L.A. Times* issues a report that compared this to another
7 site, LiveLeak.

8 The thing that is special about WikiLeaks is that it
9 authenticates and fewer than 1 percent of the materials are
10 potentially -- are identified as potentially authentic. So this is a
11 time at which everybody in public knows that WikiLeaks is different
12 in the sense that it authenticates. But the report, as a key part of
13 its analysis, in the executive summary and the body says WikiLeaks
14 has a stated policy of not authenticating, it's simply false, a
15 mistake, not false in the sense of bad intent. Simply a mistake.

16 Q. Does anything in the report support or undercut the
17 determination that WikiLeaks is an investigative journalistic
18 organization?

19 A. No. Quite the contrary. I'd say that there are multiple
20 references throughout the report that would lead a reasonable reader
21 to see WikiLeaks as a journalistic organization. At one point the
22 report says on the 9th of November 2007, WikiLeaks published an
23 investigative report on such-and-such. In this case, it was on the

1 use of chemical weapons by U.S. forces. In many places it describes
2 WikiLeaks staff writers or editors. It describes Julian Assange,
3 WikiLeaks foreign staff writer, co-authors are repeated again and
4 again.

5 The whole of Appendix B is a careful analysis of what
6 WikiLeaks did in the context of tables of equipment which included,
7 based on this appendix, computerized search and structuring, cross-
8 referencing with open source material, provision of context. Most
9 journalistic organizations would be extremely proud to have the
10 capacity to take a complex set of technical materials.

11 There's a point at which, for example, the report describes
12 WikiLeaks reaching out to national ground intelligence staff to
13 verify a particular report regarding the battle of Fallujah and
14 actually says, they had high journalistic professionalism in reaching
15 out to try to assure fair use. So I'd say that based on all of
16 these, somebody that comes away reading this, states this is a
17 journalistic organization that the author of the report is worried
18 about. But there is little doubt that it's a journalistic -- hard-
19 hitting journalistic investigative organization.

20 Q. Is there anything in the 2008 Pentagon report that supports
21 undercutting -- treating WikiLeaks any differently than the *New York*
22 *Times*?

1 A. No, I don't think so. I think if anything, it's precisely
2 these repeated references to investigative report, to staff writer,
3 to foreign staff writer, to co-authors, to the degree of analysis,
4 frankly. There are places in this report where the author disagrees
5 with the legal interpretation of a WikiLeaks' story. So clearly
6 there is investigation, there is a story, there is a framework with
7 which the report of the article is arguing. These are the things at
8 the very core of investigative journalism. You find the fact, you
9 understand the context and create the critique. You walk away from
10 this and you say this is what this organization is doing, at least if
11 this is all you're reading about it. You worry about it, but it's a
12 journalistic organization.

13 Q. I would like to talk about the article that you wrote and
14 the various time periods that you marked as a, kind of a change in
15 how WikiLeaks is being viewed. Okay?

16 A. Yes.

17 Q. I'd like to first start off with the publication of the
18 Apache video charged in this case.

19 A. Yes.

20 Q. When was that?

21 A. April 5th, 2010.

22 Q. And how was the video released by WikiLeaks?

1 A. The video was released in a press conference at the
2 National Press Club.

3 Q. How was the video received by the media at that point?

4 A. I'd say there were split views. *The New York Times* wrote
5 about this in the framework of saying with this release WikiLeaks is
6 edging closer to investigative journalism. An advocacy talked about
7 how -- described how WikiLeaks had five full time employees reviewing
8 the materials. How they had, at least according to this report, 800
9 to a thousand area experts that were looking at the materials and
10 trying to understand what was and was not. How they had collaborated
11 with an Icelandic television station and spent \$50,000, to send two
12 reporters over to Iraq to verify and provide context of the
13 background. So this was the *New York Times* response.

14 The head of Reuters talked about the video as being
15 incredibly troubling but something that was important to watch. But
16 there was also a lot of criticism. There was a lot, this was, that
17 the editing in particular was unfair. I'd say Fox News was the
18 primary proponent of that particular view, that the editing was very
19 unfair and not appropriate.

20 Q. Now, I want to go to the next charged release. What was
21 the next set of documents that WikiLeaks released?

22 A. These were the Afghan war logs in July of 2010.

1 Q. Before publication, did WikiLeaks partner with any
2 traditional media organizations?

3 A. Yes, it did. It partnered with the *New York Times*, the
4 *Guardian* and *Der Spiegel*.

5 Q. What was the nature of the partnership?

6 A. WikiLeaks handed the materials over to the news
7 organizations several weeks before publication, agreed on a
8 publication schedule -- on a joint publication schedule and then the
9 newspapers were to release their stories as well as some of the
10 materials at the same day that WikiLeaks would publish the underlying
11 materials themselves.

12 Q. And ----

13 A. I'm sorry.

14 Q. Go ahead, I'm sorry.

15 A. Both the newspapers and WikiLeaks would publish some
16 portions, although in very different proportions.

17 Q. Based upon that publication, how did the view of WikiLeaks
18 start to change, if at all?

19 A. So there was a major -- there were several public
20 statements by officials that I think began to shift publicly.

21 MJ: Yes?

22 ATC[CPT MORROW]: Objection, Your Honor. Now we're getting into
23 the reaction ----

1 MJ: What is the relevance of that?

2 CDC[MR. COOMBS]: The Defense's position is based upon both
3 the -- and I can, if I have a break, I can give you the prosecution
4 exhibit that references UBL reaching out to WikiLeaks. The Defense's
5 position is that rebuts the idea that the enemy would use WikiLeaks
6 as a source of intelligence initially prior to these leaks because
7 what happens is, essentially after these leaks start to happen, the
8 government rhetoric against WikiLeaks makes them appear to be an
9 enemy. And that -- that rhetoric is what drives the enemy to
10 actually go look at WikiLeaks, not the actual publication of the
11 information. So ----

12 MJ: Well, I've already taken judicial notice of statements that
13 you've given me with respect to public comments about WikiLeaks. Why
14 are we doing it through this witness?

15 CDC[MR. COOMBS]: Well, this witness, Your Honor, because of
16 his article -- and that's basically part of the focus of the article
17 is explaining how a journalistic organization is basically -- and
18 especially in this country, is changed from being a legitimate
19 journalistic organization to being a terrorist organization based
20 upon the response by the government. And the government, in this
21 case, with how they charged it, they have relied upon the enemy --
22 information of the enemy going to WikiLeaks which, is after these
23 comments that Professor Benkler will talk about occurred. Also, when

1 you look at both the UBL stip, the redacted and unredacted, and
2 Commander Aboul-Enein's stipulation, which is PEs 153 Alpha and PE
3 183.

4 MJ: Let me see those documents, please. Actually, why don't we
5 -- this is a good time to take a 10-minute recess. I would like to
6 see the documents that you're talking about before making a ruling on
7 this issue.

8 CDC[MR. COOMBS]: Yes, Your Honor.

9 MJ: Professor Benkler, during your recess, please don't discuss
10 the testimony with anyone other than the counsel or accused.

11 Court is in recess.

12 **[The court-martial recessed at 1116, 10 July 2013.]**

13 **[The court-martial was called to order at 1140, 10 July 2013.]**

14 MJ: Court is called to order.

15 Let the record reflect all parties present when the Court
16 last recessed are again present in court.

17 During the recess, I looked at the exhibits the defense
18 wanted me to look at. I would like both parties to set forth their
19 position. And defense I would like you to explain to me exactly
20 where we are going with this witness' testimony and what you plan to
21 do with it. Go ahead.

22 CDC[MR. COOMBS]: Yes, Your Honor.

1 So the defense's position is that the documentation that
2 the Court considered provides the relevant basis for why we want
3 Professor Benkler to talk about how the view of WikiLeaks started to
4 change as each of these releases started to happen. The government
5 has offered both the 2009 Most Wanted List and the other
6 documentation that we referenced in order to depict WikiLeaks as an
7 organization that PFC Manning should have known would have given
8 information to the enemy. In fact, they actually had to prove he had
9 actual knowledge that by giving it to WikiLeaks he was providing it
10 to the enemy.

11 The defense's position on this is that anyone looking at
12 WikiLeaks prior to the charged releases, including the 2008 document
13 produced by ACIC, would have viewed WikiLeaks as a legitimate news
14 organization. The only argument to start to question that begins
15 after these releases happen and the government's ultimate responses
16 to each release and how that rhetoric gets amped up after each
17 release. And it is that and the Defense's position is where the
18 government gets its argument that there should be any concern or
19 knowledge on PFC Manning's part that WikiLeaks might provide
20 information to the enemy.

21 Additionally, the defense's position is that the enemy went
22 to get this information only after the government's responses to the
23 leaks and that's what prompted them. So from the defense's position

1 this not only rebuts the idea that PFC Manning would have had any
2 actual knowledge for the Article 104 offense, but it also for
3 Specification 1 of Charge II, it rebuts the idea of any wanton
4 conduct by PFC Manning by choosing to release information to a
5 legitimate news organization. The actual release of that information
6 was wrongful and he's accepted responsibility for that. But it was
7 not wanton. So the defense believes it was relevant for both the
8 Article 104 offense and also with regards to Specification 2 of
9 Charge II.

10 Additionally, we would envision the government arguing that
11 WikiLeaks was or is anything but a legitimate news organization. If
12 they intend to do that, the defense believes we should be able to
13 provide information that rebuts that. And the information that
14 Professor Benkler would provide would be how that view of WikiLeaks
15 came to be and it really is, as a result of the government rhetoric
16 in response to each of these releases that it even started to
17 question whether or not WikiLeaks was a legitimate news organization.

18 The defense intends to go through each of the charged
19 releases. We're currently at the Afghan SIGACTS. But we intend to
20 go from the Afghan SIGACTS to the Iraq SIGACTS, to the diplomatic
21 cables and then come to a conclusion. We do not intend to go past
22 just the actual release and the initial response by the government
23 and how that response started to change the view, at least in the

1 public conversation of WikiLeaks both in the American public
2 conversation, just in general, but also how the print media and news
3 media started to portray WikiLeaks as now no longer part of the
4 legitimate news organization. But we're not going to go into the
5 other aspects of Professor Benkler's article that talk about freezing
6 assets of WikiLeaks or, you know, officials asking various companies,
7 like MasterCard and PayPal and others to no longer participate.
8 We're not going down that road, ma'am.

9 MJ: All right. Government, you just heard what the defense is
10 planning to do. What is the government's position?

11 TC[MAJ FEIN]: Yes, ma'am. A few first to note for the record
12 any references that the defense is arguing what PFC Manning might or
13 might not have known is for argument and there is actually no
14 evidence before court of that, only what was researched in SIPRNET
15 through the ACIC documents, C3, and CISIR training he received.

16 The government's overall objection, Your Honor, is that the
17 only material that is relevant is what was relevant during the time
18 what PFC Manning could have known. So that would have been prior to
19 essentially pretrial confinement forward. And that would then be
20 relevant to potentially an argument, his knowledge on WikiLeaks and
21 what WikiLeaks did or did not do. So any evidence of the
22 government's reaction after the commission of his offenses could be
23 irrelevant to the charges in this case. And that's true for

1 Specification 1 of Charge II and The Charge of Specification 2. So
2 ultimately it's a timing issue, Your Honor.

3 And the government doesn't intend to argue at all about
4 what WikiLeaks did or did not become. It's only at the time of the
5 commission of the offenses what PFC Manning did or did not, should or
6 should not have known.

7 MJ: Okay. I've considered the exhibits, I've listened to
8 argument of counsel. Mr. Coombs, if you confine your examination to
9 the leaks and the reactions thereafter and don't go beyond that, I
10 will allow it.

11 CDC[MR. COOMBS]: Yes, Your Honor.

12 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

13 Q. So let's talk -- let's go back to the Afghan SIGACTS,
14 Professor Benkler. When were these documents released?

15 A. July of 2010.

16 Q. And before that publication, what news organizations did
17 WikiLeaks partner with?

18 A. The *New York Times*, the *Guardian* and *Der Spiegel*.

19 Q. And how was the publication of the Afghan SIGACTS
20 accomplished or done?

21 A. WikiLeaks gave the materials to the news organizations a
22 few weeks prior to the publication. Each organization analyzed the
23 materials as it did in its own professional process and

1 organizations. The four organizations agreed on a date on which the
2 newspapers would release their stories and some set of the collection
3 of logs and WikiLeaks would release a larger section of the logs at
4 the same time.

5 Q. And did each of the news organizations publish ultimately
6 all the Afghan SIGACTS?

7 A. No, they didn't. They published parts of them depending on
8 what their stories were.

9 Q. Now, did the reporting of the Afghan SIGACTS by WikiLeaks
10 and other news organizations generally report -- this is again in
11 general, generally report on issues of importance to the public?

12 A. Yes. They were considered to be important. There were no
13 clear major smoking gun issues that were raised. Broadly speaking,
14 they created a public record of ground view realities of the war and
15 that's how they were understood. There were some discrete things
16 that were -- that raised more public concern but they were viewed
17 very wide and reported on very widely as matters of broad public
18 concern.

19 Q. How did the United States respond, again in general, to
20 this publication?

21 A. A couple of responses. Admiral Mullen said WikiLeaks would
22 have blood on its hands. General Jones reported publicly to have
23 said that WikiLeaks was endangering lives. Those were the primary

1 public responses. Although Secretary Gates in a letter to Senator
2 Carl Levin in requests to a formal answer, to a formal report on what
3 the damages done by the disclosures were, reported that to that point
4 none had occurred.

5 Q. Based upon this time period, did you see any change in how
6 WikiLeaks was being viewed or started to be viewed?

7 A. There were some reports in the media broadly that were
8 questioning the organization but the shift did not, in a significant
9 way, begin until later in the stories.

10 Q. Did the same questioning of WikiLeaks apply equally to the
11 other news organizations that WikiLeaks had ----

12 A. No, absolutely not. Both the government and other media
13 had no similar critique of the other organizations of the *New York*
14 *Times*, the *Guardian*, of the *Der Spiegel* for reporting on and making
15 available some of the war logs. The wrath was reserved purely for
16 WikiLeaks.

17 Q. Now, what was the next set of documents or documents that
18 WikiLeaks released?

19 A. These were the Iraq SIGACTS in October of 2010.

20 Q. And before the publication of Iraq SIGACTS did WikiLeaks
21 partner again with these news organizations?

22 A. The same three news organizations.

23 Q. And how was the publication of the Iraq SIGACTS handled?

1 A. In similar ways. Again, materials were available, a
2 publication date was agreed on and the materials were published
3 alongside the stories.

4 Q. And again, in general, how was the publication of Iraq
5 SIGACTS part of the -- of importance to public and public
6 consumption?

7 A. So again, these were raised very publicly as an important
8 insight into how the war was going on. It was understood and reported
9 by different media in different ways. The *New York Times* emphasized
10 more of the texture and the reality and the sense of providing the
11 American public with a sense of what the war looked like. There were
12 discrete disclosures that were understood to have actually raised
13 significant differences from what the public record had been before
14 and these were reported on as discrete revelations. That was the way
15 in which it was.

16 Q. How did the United States respond to this publication?

17 A. The response was similar, although the direct response in
18 terms of the demand for non-publication was similar. The public
19 response was not as clearly vocal as it was to the first instance or
20 what it would become to the last of the instances.

21 Q. And what was the next set of documents released by
22 WikiLeaks?

1 A. These were the Embassy cables. The first 272 of which were
2 released on November 28th of 2010, known as the Embassy cable
3 release.

4 Q. And before this publication, did WikiLeaks partner with
5 traditional media organizations?

6 A. Yes, they did. They partnered with the *Guardian*, *Der*
7 *Spiegel*, *Le Monde* and *El Pais*. They had excluded the *New York Times*
8 this time because the *New York Times* had run an extremely derogatory
9 story on Assange alongside with the Afghan war logs and this was seen
10 as inappropriate by WikiLeaks. But then the *Guardian* passed on the
11 materials to *New York Times* so that as a practical matter the
12 collaboration worked very similarly to the first round, except for
13 the addition of *Le Monde* and *El Pais*.

14 MJ: Did you say the derogatory story was after the release of
15 the Afghan war logs?

16 WIT: Alongside the release of -- I'm sorry, the Iraq war logs. I
17 apologize. I misspoke.

18 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

19 Q. In general, again, how was the public reception to the
20 release of the diplomatic cables?

21 A. It was odd. These cables were released in a much more
22 controlled and measured way than either of the prior two, even though
23 the prior two themselves had had degrees redaction and control in the

1 WikiLeaks set. But the response is hard to define as anything but
2 shrill. Secretary of State Clinton described it as an attack on the
3 international community. Vice President Biden on a television
4 interview said that Assange was more like a high tech terrorist than
5 the Pentagon papers. Representative Steve King who was then incoming
6 chair of the Homeland Security Committee in the House called for
7 WikiLeaks to be described -- to be defined as a foreign terrorist
8 organization. Senator Diane Feinstein, who was then the chair of the
9 Senate Intelligence Committee, called for prosecution of Assange
10 under the Espionage Act. And Senator Lieberman called for, who was
11 then chair of the Senate of the Committee on Homeland Security,
12 called for companies to stop providing services to WikiLeaks.

13 Q. Did traditional media assist in the government -- the
14 government's efforts, I guess, in delegitimizing WikiLeaks?

15 A. Absolutely. I'd say there were three distinct components
16 to the traditional media response. One was primarily typified by Fox
17 News, the Weekly Standard, so this was a context in which Bob Beckel,
18 who had been Deputy Assistant Secretary of State in the Carter
19 Administration speaks on Fox News and says of Assange, he's a
20 traitor, he's a treason, I don't believe in the death penalty.
21 There's only one solution, illegally shoot the son of a bitch.

22 Or William Kristol in the *Weekly Standard* writes that the
23 first order of business in the meeting of the White House and the

1 congressional leadership needs to be how to destroy -- degrade,
2 destroy WikiLeaks. Describing -- describing the organization in
3 these terms. Governor Sarah Palin tweeted that *Weekly Standard*
4 report and said of Assange, he's an anti-American operative with
5 blood on his hands. Why don't we deal with him with the same urgency
6 that we deal with al-Qaeda and Taliban. That was the response on
7 that side.

8 The *New York Times* itself continued the same approach that
9 it begun to develop right after the Iraq logs. Tom Friedman,
10 probably the best known op-ed writer of the *New York Times* wrote an
11 op-ed in which he talked about there being two major threats to the
12 world, one was China the superpower, and the other was super
13 empowered individuals like WikiLeaks, and compared those to the major
14 threats to the world. *New York Times* editor Bill Keller published an
15 8000 word *New York Times* Magazine description of the events in which
16 the same WikiLeaks and the same Assange that the news reporting part
17 of the organization 8 months earlier had called a muck-raking site, a
18 small online site that provides information that governments and
19 corporations would like to be -- would like to keep quiet, suddenly
20 started to describe WikiLeaks as a secretive cartel of antisecrecy
21 vigilantes. He described Assange in terms of like badly smelling as
22 though he hasn't bathed in months and repeatedly tried to denigrate
23 the professionalism.

1 Finally, there was similar poor reporting. In a study I
2 did of all of the stories in the first 2 weeks following November
3 28th, over half the news stories simply falsely reported that
4 WikiLeaks had dumped thousands or 250,000 cables without -- without
5 any redaction. And only 20 percent of stories reported accurately
6 that 272, not 250,000, simply 272 cables were released. They were
7 released in exactly the form that they were released by the
8 traditional media organization in the redacted form that they were
9 released.

10 So this combination of poor reporting, attack by the *New*
11 *York Times* and very vigorous attack on the right wing certainly
12 resonated with the initial set of statements from more government
13 officials to completely shift the view of WikiLeaks from what it had
14 been a mere 8 months earlier.

15 Q. Now, I want to end by asking you a few questions about the
16 Networked Fourth Estate.

17 MJ: Of what?

18 CDC[MR. COOMBS]: I'm sorry ma'am, the Networked Fourth Estate.
19 **Questions continued by the civilian defense counsel [MR. COOMBS]:**

20 Q. How does the Networked Fourth Estate differ from
21 traditional media?

22 A. The Networked Fourth Estate differs from traditional media
23 along similar lines to which we see software development or video

1 differ from traditional models. That is to say, instead of having a
2 relatively small number of organizations organize around relatively
3 concentrated capital ownership, in the mid-19th Century it was the
4 major presses, later on it was the recording studios and the
5 satellites and etcetera, where you have a single set of operators
6 working in a single organization.

7 What you see now is a much diverse set of actors. You do
8 see important roles for some traditional media like the *Times*,
9 *Guardian* and *BBC*, but you see them complemented by a range of
10 different other organizations. You see much smaller nonprofit --
11 much smaller for profit organizations that have low cost, low return,
12 like but sustainable, like *snopes.com* or *Tech Dirt* that are either
13 specific to an area or specific to a function. You see non-profit
14 organizations like the Sun Life Foundation, like ProPublica, like the
15 Bureau of Investigative Journalism who work on a non-profit level
16 like WikiLeaks, work on a nonprofit basis and are able to contribute.
17 You see academic centers producing suddenly something that instead of
18 being only academic is part of the journalism. So factchecked.org is
19 an example of that. And you also see distributed networks of
20 individuals rising at certain moments. You might see the blog of an
21 academic economist suddenly becoming a very important source of
22 editorials or of analysis. You might see the blog of a particular
23 academic or particular activist suddenly show up.

1 So it's individuals, non-profits, academics, small
2 commercial interacting with the large traditional commercial
3 organizations that today create this new model of network journalism.

4 Q. How has the traditional media historically responded to the
5 Networked Fourth Estate?

6 A. They started out with a rather dismissive just some guy in
7 his pajamas kind of statements about a decade ago. Then I'd say
8 around 2009 there was panic, this thing is going to destroy our
9 industry, where it's going to be the future of news. I'd say today
10 -- again, this follows so many of the other industries that have
11 encountered this.

12 Today there's much of a recognition that there is a need to
13 incorporate these methods. So if in 2006 the only photos from the
14 London underground bombings were people with their cellphones and
15 that was unique and new, today, after the Arab Spring where the
16 primary source of video for street protests was people on the
17 streets, you see the *BBC*, the *Guardian*, integrating are you there,
18 let us know. Do you have a particular experience? Do you have
19 particular focus? They're beginning to integrate these distributed
20 models into their own future development. The same way that software
21 companies, 40 percent now actually produced open source software,
22 there's denial, panic and then incorporation and growth.

1 The Columbia School of Journalism, the leading School of
2 Journalism, in the U.S. for example hired Emily Bell who had
3 developed the *Guardian's* online framework, which is largely
4 considered to be the most sophisticated integration to actually teach
5 the new generation of journalists what everybody understands they
6 need to know, how to operate in this new environment.

7 Q. Is WikiLeaks a member of the Networked Fourth Estate?

8 A. Absolutely.

9 Q. Why do you believe that?

10 A. It is -- journalism is made up of many things. WikiLeaks
11 doesn't do interviews and pound the pavement. Again, when we say
12 WikiLeaks, we're really talking about before the severe degradation
13 that followed the attack on the organization that we described just
14 before. WikiLeaks was a solution to a very particular and critical
15 component of the way in which investigative journalism, muck-raking
16 confined instances of corruption. It's -- we don't only live from
17 Pentagon papers or Watergate or the NSA wire tapping scandals of 2005
18 and the more recent months. But it's a clear, distinct component of
19 what in the history of journalism we see as high points, where
20 journalists were able to come in and say, here's a system operating
21 in a way that is obscure to the public and now we're able to shine
22 the light.

1 That's what WikiLeaks showed how to do for the network
2 public sphere. WikiLeaks may fail in the future because of all these
3 events, but the model of having some form of decentralized leaking,
4 that is secure technologically and allows for collaboration among
5 different media and different countries, that's going to survive and
6 somebody else will build it. But WikiLeaks played that critical role
7 of that particular critical component of what muck-raking and
8 investigative journalism has always done.

9 CDC[MR. COOMBS]: Thank you, Professor Benkler.

10 No further questions.

11 MJ: Cross-examination?

12 ATC[CPT MORROW]: Yes, Your Honor, I'd like to go for a little
13 bit and potentially break for lunch at that point. Consider some
14 other things that we may want to show Professor Benkler and come back
15 after that.

16 MJ: Any objection to that?

17 CDC[MR. COOMBS]: No objection, Your Honor.

18 MJ: Go ahead.

19 **CROSS-EXAMINATION**

20 **Questions by the assistant trial counsel [CPT MORROW]:**

21 Q. Professor Benkler, I'd like to start by sort of talking
22 about your research methodology.

23 A. Yes.

1 Q. Now, you became interested in the topic of WikiLeaks
2 sometime in April 2010; is that correct?

3 A. Yes.

4 Q. And that was because of the Apache video release?

5 A. Yes.

6 Q. Now, your research methodology was essentially to collate
7 everything that had ever been written on the subject of WikiLeaks,
8 right?

9 A. That was the ambition.

10 Q. That was the ambition. What was your research methodology?

11 A. I tried to pull together what I could find that had been
12 written publicly in traditional media as well as online as well as
13 well prior instances of the WikiLeaks site itself.

14 Q. So you looked at online news sources?

15 A. Yes.

16 Q. You looked at traditional news sources?

17 A. Yes.

18 Q. You used the internet archives specifically to look at how
19 WikiLeaks looked at particular periods; is that right?

20 A. I did.

21 Q. And you didn't think necessarily that the internet archived
22 information was particularly helpful, to your analysis?

1 A. Mostly what it showed me that there was no major change and
2 that the origin story was very similar to the way that it had been
3 initially.

4 Q. And so once you sort of had gotten all these articles and
5 sources together, you did almost all of the reading yourself?

6 A. Yes.

7 Q. And you did all of the writing for this paper?

8 A. Yes.

9 Q. But you had research assistants essentially do the
10 collecting for you?

11 A. Yes.

12 Q. And you were interested in how WikiLeaks was viewed prior
13 to the leaks related to this case?

14 A. Yes.

15 Q. And you were interested in how they were viewed after the
16 leaks related to this case?

17 A. Yes.

18 Q. And so you read practically every article on WikiLeaks you
19 could find from 2007 to March of 2010. That is one block of your
20 analysis or one block of your research; is that correct?

21 A. Yes.

22 Q. As you were reading, you would mark instances where you saw
23 sort of a good or bad reference?

1 A. Yes.

2 Q. And can you describe that process, please?

3 A. I read the materials. When I identified things that were
4 particularly critical, I would mark them; when I identified things
5 that were particularly relevant, or really more than a passing
6 reference I would mark them; when I would identify things that were
7 particularly positive I would mark them so that I could come back and
8 report on them. Then as I wrote I went back and forth between the
9 materials and my notes.

10 Q. In some of these earlier articles you were looking at, I
11 believe you said valence, tone and content?

12 MJ: What was that?

13 ATC[CPT MORROW]: Valence, tone and content.

14 **Questions continued by the assistant trial counsel [CPT MORROW]:**

15 A. Valence, were they positive or negative tone, in terms of
16 their general view and the particular contents. What they were
17 describing. Yes.

18 MJ: What is valence?

19 WIT: Whether they are positive are negative.

20 MJ: Keep going, I'm sorry.

21 ATC[CPT MORROW]: It's a chemistry term, I believe; is that
22 correct?

23 WIT: Apparently.

1 Q. Anyway, keep going. I'm sorry.

2 A. That was it.

3 Q. This was actually reporting mostly about WikiLeaks; is that
4 correct?

5 A. I was looking primarily for reporting about WikiLeaks and
6 when WikiLeaks had -- I was trying to understand what WikiLeaks had
7 actually found. I was trying to understand how it was described but
8 also what were the stories that were not simply on the side but
9 actually moved the needle in the public reporting, so both of those.
10 That's the content part.

11 Q. And you had practically every single article on WikiLeaks
12 post March 2010 as well; is that correct?

13 A. I'd say I had a very strong emphasis on materials, a very
14 discrete strong emphasis on materials after the Embassy cables but I
15 also read the articles in between, yes.

16 Q. And again, it was sort of the same methodology, you would
17 read an article, look at the tone and content and then or look at
18 whether it's a good or bad reference, make highlights, make notes and
19 look at the tone and content; is that correct?

20 A. That was the general -- that was the general method, yes.
21 Specifically for the study right after -- for the 2 weeks right after
22 I actually sorted them into accurate, inaccurate and vague in order
23 to be able to make the statement or in order to be able to find out

1 how many or what proportion of the stories that mentioned some number
2 of cables correctly described the 272 cables as opposed to said
3 thousands or 250,000.

4 Q. How did you determine whether something was accurate or
5 inaccurate?

6 A. For that particular period?

7 Q. Yeah.

8 A. There was a fact. There was a fact, 272. Then there were
9 several more and then there was several more and then there was
10 thousands as opposed to 250,000. I made the judgment of what I knew
11 to be the state of the world and I compared it to what was reported.

12 Q. So that was that period?

13 A. Yes.

14 Q. What about the period between March and November of 2010?

15 Same ----

16 A. I did not make the same sorting about what was accurate and
17 what was not. And I made the best judgment again, less formally
18 structured. But -- because -- some things are easy: 272 is not
19 250,000. Some things are harder and more textured. So I made the
20 judgment based on my best understanding of everything I read about
21 WikiLeaks, about how consistent what I read was with what I had known
22 from the prior materials.

1 Q. During your research and writing, I believe you said
2 yesterday that this wasn't really quantitative analysis; is that
3 correct?

4 A. Yes. Sometimes you can try to do quantitative analysis
5 with content. Sometimes it's harder because you're looking for more
6 qualitative understanding and it's very hard and inaccurate
7 essentially. You pretend to have data but, in fact, it turns out to
8 be inaccurate when you're trying to quantify things that are more of
9 one's best understanding. At which point what you try to do is you
10 have a single researcher read through and form a consistent opinion
11 of that one researcher.

12 Q. And would you say that at least in your field sometimes
13 people do quantitative analysis?

14 A. Absolutely. I do, too.

15 Q. Okay. As you were reviewing, you were writing on the
16 articles and sort of setting them aside and sort of categorizing them
17 again, tone, content, that sort of thing?

18 A. Yes.

19 Q. Had you employed this specific research methodology in the
20 past?

21 A. To specific -- to specific case studies, yes. So, for
22 example, I reported in a chapter of Wealth and Networks on -- as I
23 was trying to explain how the blogosphere of queries, questions, I

1 did a similar study of critique of Diebold machines that were voting
2 machines that were questioned in the 2002 election. I did the
3 similar -- so yes, I have in the past tried to do case studies as
4 particularly richly detailed.

5 There's always a tradeoff between what you can identify in
6 very precise quantitative terms that are usually very thin and don't
7 give you the texture of the event and what you can do with textures,
8 qualitative analysis. And I tried to use both methods for wherever
9 they are most useable.

10 Q. As part of your research, you didn't view any videos of
11 Julian Assange or any other WikiLeaks individuals in the course of
12 your research?

13 A. I didn't really look for videos of Assange or others as a
14 particular source, no.

15 Q. Sometime in February 2011, I believe you posted your
16 article on your personal website, right?

17 A. I did.

18 Q. And that's sort of a normal process?

19 A. It's certainly normal for me. I've been publishing my work
20 openly since the late '90s. To me it's an important way of getting
21 feedback from people who I don't happen to know on what is right and
22 wrong about what I do.

23 Q. Then the summer of 2011 it was published?

1 A. Yes.

2 Q. And you said earlier that prior to its formal publication
3 you received an e-mail from Julian Assange; is that correct?

4 A. Yes.

5 Q. And that e-mail had your article as an attachment to the e-
6 mail?

7 A. I believe that's what it was. That it was an attachment
8 with annotations to the documents. I didn't go back to look to see
9 whether it was that or two documents side-by-side.

10 Q. But in any event, Mr. Assange provided you comments to your
11 article?

12 A. Yes.

13 Q. And he provided his perspective on several events?

14 A. Yes.

15 Q. And he provided you additional information that at that
16 point you had not looked at?

17 A. Yes.

18 Q. And you cited Mr. Assange's annotations in your article?

19 A. Yes, I did.

20 Q. But not for any facts necessarily?

21 A. I didn't cite them for the truth of their content. If I
22 was citing something for the truth of its content, I cited it
23 specifically as this is the view asserted by Mr. Assange in the

1 annotations. If the question was, did you -- here's a mistake in
2 fact of what you have, I went back and did the research for myself
3 and formed my own opinion on these particular facts. There is no
4 point that I simply took the assertion of fact without noting it's an
5 assertion of fact from this.

6 Q. So his comments did make you go back and do additional
7 research?

8 A. Yes.

9 Q. Or look at the research?

10 A. Yes.

11 Q. Now, when you were conducting the research on the news
12 media accounts of WikiLeaks, you did not really consider the news
13 outlet itself; is that correct? You weren't trying to assign value
14 to the news outlet?

15 A. It depends for what. I'd say that if what I was trying to
16 do was understand whether a particular revelation had been discussed,
17 I ignored the particular source. If what I was trying to understand
18 was the relative likely truth value, I provided some weight to the
19 quality that I believe the news site to have but it depended on the
20 context.

21 Q. So you looked at the quality of the assertion in some
22 cases?

23 A. Yes.

1 Q. Would you agree that the tone and content was more
2 important to your research than who exactly was saying? So the tone
3 and content and the quality of the assertion is more important than
4 who actually was saying it?

5 A. It was a mix I would say of both. They informed each
6 other. I certainly cared a lot of the tone and particularly the
7 content to try to understand what was the unfolding of the events.
8 But I couldn't ignore completely the quality of the publication.

9 Q. Your conclusion is that sort of pre-Manning, so early 2007
10 to 2010, WikiLeaks was generally a somewhat responsible news
11 organization?

12 A. As I said, I think there was a lot of concern and
13 speculation early on. I think there was an increasing degree of
14 comfort with the message of the organization over the course of 2008,
15 and I'd say that from the Julius Baer affair in early 2008, and
16 increasingly so, over the course of 2009, the tenor of the articles,
17 not obviously uniform, but the tenor of the articles was one that
18 increasingly saw WikiLeaks as a major new player in the new
19 journalism, yes.

20 Q. Over the course of 2010, you talked about this with Mr.
21 Coombs, WikiLeaks became more integrated with traditional news media?

22 A. Yes, they did. Not always easily.

1 Q. Not always easily, but it happened and on several releases
2 there was some kind of integration?

3 A. Yes.

4 Q. But at least in your article, eventually your conclusion is
5 that the government's reaction to WikiLeaks was sort of overwrought?

6 A. Yes, well, overwrought was the term that Secretary Gates
7 used for it and I thought it was a remarkably well placed assessment.

8 Q. Yes. And I'm referring mainly there to the reaction of the
9 release of the Afghan database, the Iraq database and the Department
10 of State cables?

11 A. Yes.

12 Q. And you thought this overwrought reaction, how Secretary
13 Gates said it, was more likely than some of the other public
14 statements made by various officials?

15 A. Yeah.

16 Q. You've assigned a value to that statement versus other
17 statements?

18 A. Yes. I have spent a significant amount of time reading up
19 on this organization. I had formed a certain view based on the
20 reading that I described to you earlier. And then I met these
21 assertions of high tech terrorists, terrorist organizations, they
22 were simply incongruous with everything I had done in my research and
23 seen this organization. There was a deep discontinuity and

1 incongruity between what I knew to be the case, at least based on my
2 research to that point, and these public assertions that, yes, I
3 would say that I assigned a truth value higher to the report that
4 said it was overwrought to say of Assange that he's a high tech
5 terrorist than to statements that actually made those assertions.

6 Q. And your assigning a value, at least in that particular
7 case, was based in part on Secretary Gates' position. He was the
8 Secretary of Defense at the time, right?

9 A. I made that assessment based on my reading of the history
10 of WikiLeaks, my own judgment based on my own research and the
11 incongruity. I cited Secretary Gates because I thought it was
12 important to see that even someone within the administration who had
13 responsibility over this area, could see how implausible the response
14 was. It was for that aspect, the fact that you didn't need to be an
15 outsider, you could actually sit on the inside and still see that the
16 response was an implausible response. But the foundation for my
17 judgment was my own research and understanding based on my own deep
18 knowledge of how the organization had been seen a mere few months
19 earlier.

20 Q. Right. But in large part, Secretary Gates' position or at
21 least his description of the reactions being sort of overwrought,
22 your value, assigning of a value to sort of that position was based
23 in some part on some of the other news articles that you read where

1 there were people that were unnamed sources that also sort of
2 confirmed what Secretary Gates says; is that correct?

3 A. The unnamed source is a little bit different. This here I
4 referred to Secretary -- so there are two statements of Secretary
5 Gates they cite.

6 The first one is in a press conference with regard to the
7 response, with regard to the Embassy cables being overwrought. The
8 claim that embarrassing and uncomfortable, sure, but damaging to
9 foreign policy, not likely. That was with regard to the Embassy
10 cables.

11 There's another reference I make which I do assign more to
12 Secretary Gates' judgment than to others because it was in a formal
13 letter in response to a formal request for assessment from a relevant
14 Senatorial oversight committee and that I take to be a public
15 document and that's why I give that higher support. Secretary Gates
16 in the context not of press release and managing public perception
17 but in the context of a formal response to a formal request to the
18 relevant oversight committee makes the claim. That I give its own
19 truth value on that institutional basis.

20 Q. Now, one of the other facts you cite in your article in
21 support of your assertion that the government reaction was sort of an
22 overreaction, was the fact that PFC Manning, at the time of the

1 article, in your opinion, had been held in solitary confinement for 8
2 months; is that correct?

3 A. That was one of the issues that I referred to in that
4 article, yes.

5 Q. And you actually referred to it in several places in the
6 article?

7 A. I did.

8 Q. You said that as of that writing Manning had been in
9 solitary confinement for over 8 months, denied pillows and sheets and
10 locked in a cell for 23 hours a day?

11 A. That was the information as then available in public open
12 media that were available to me, yes.

13 Q. And that, again, that was derived from news sources?

14 A. Yes.

15 Q. As well as Mr. Coombs' blog. I believe you cited Mr.
16 Coombs' blog in your article as well?

17 A. Yes, I did.

18 Q. And that was because -- that fact was basically the fact
19 that was sort of the primary public source reporting on the
20 conditions of his confinement, right?

21 A. Precisely.

1 Q. And then you stated that the treatment seemed consistent
2 with the Pentagon report's emphasis on the deterrence against
3 potential sources of leaks as a core tactic to undermine WikiLeaks?

4 A. Yes, I did. If you look at the ACIC report, it basically
5 seems to come to a conclusion that it's very hard to suppress
6 information once it's on WikiLeaks, and that the core target needs to
7 be on trust as the center of gravity. In other words, to undermine
8 the concept that WikiLeaks is a place where a leaker can go and trust
9 that they won't be revealed. So in order to prevent this distributed
10 leaking, it's necessary to increase the fear, at it were, or the
11 constraint on potential leakers. A judgment I made at the time based
12 on the public reports of PFC Manning's treatment and my understanding
13 of the, one of those key judgments of the report was that treating
14 PFC Manning very badly was -- would be consistent with the goal of
15 deterring future whistleblowers.

16 Q. That's not necessarily your judgment today, but it was your
17 judgment at the time based on what was available to you in open
18 source?

19 A. This is what you asked me now.

20 Q. Now, Professor Benkler, you've never met anyone who was a
21 volunteer for WikiLeaks or an employee with WikiLeaks; is that
22 correct?

23 A. You mean as a formal interview?

1 Q. Formal interview as part of your article research?

2 A. No, no.

3 Q. And you were never an adviser to WikiLeaks formally or

4 informally?

5 A. No.

6 Q. And you've never been a volunteer for WikiLeaks either now

7 or before, prior to your time as a ----

8 A. No.

9 Q. Just generally, you were never really a party to any of the

10 accounts cited by news organizations in response to the leaks?

11 A. I'm not sure I understand that question.

12 Q. You weren't there ----

13 A. I'm not an actor. I'm an observer.

14 Q. Right.

15 A. I'm an academic observer, not an actor in these events.

16 Q. Okay. Now, when you were writing the article, and I think

17 you already said this, but you didn't seek interviews with others who

18 may have dealt with WikiLeaks or Julian Assange?

19 A. No, I didn't.

20 Q. You didn't speak with the editors at the *New York Times* or

21 the *Guardian* or *Der Spiegel* or anywhere else?

22 A. No, I did not.

23 Q. And why not?

1 A. Different methods of research in different modes. There
2 are certainly academic disciplines that work very heavily with
3 interviews, be they sociology or anthropology. I have in the past,
4 here and there, used interviews. But here I was really concerned
5 with the public record, with what was available to anyone who would
6 spend the time and effort to do it. So that's what I decided to do.
7 And this is not uncommon. Perhaps it's uncommon in journalism, but
8 it's not uncommon in academic exercises of trying to look at things
9 as they exist in the public record rather than trying to do a more
10 journalistic analysis that would involve interviews.

11 Q. Now, you said just sort of towards the end that in your
12 opinion, at least, that there have been some -- I'll quote you, some
13 very poor reporting in this case?

14 A. Yes.

15 Q. Is that correct?

16 A. I referred to the repeated references to 250,000 cables
17 being dumped by WikiLeaks at the time in which it was 272 cables that
18 were redacted and released in coordination with the traditional media
19 organization.

20 Q. So that comment specifically just recently, the very poor
21 reporting, that's mainly referring to that analysis you did in
22 November 2010, related to ----

23 A. That was primarily, primarily to that, yes.

1 Q. Now, do you believe -- did you see, at least in your
2 overview of the other time periods, so March 2010 to November or even
3 prior to March 2010, did you see what struck you as poor reporting in
4 those times as well?

5 A. Yes. They were all -- there's high variability and quality
6 of reporting throughout the period.

7 Q. Now, if your conclusions are based in large part on what
8 you've now acknowledged as sort of poor reporting in some places,
9 does that -- did you pause to sort of consider your conclusion
10 entirely?

11 A. No, not at all. This is what you do as somebody who is a
12 researcher. You assess different documents. You cross-reference the
13 various perspectives, you form a judgment about what happened and
14 then you form a second judgment about which sources you trust and
15 which you don't. It's not even always a particular, a particular
16 organization that would be more or less trustworthy. I cite in the
17 article a context in which on the same day the same newspaper has
18 three different articles on the embassy cable release. In one it
19 states the obviously false statement of 250,000 unredacted. In one
20 it states the obviously correct statement of 272, in a different
21 story on the same day. And in a third it says, began to release
22 thousands. So there's no magic bullet of if it's the *New York Times*,
23 it's always correct and if it's some other place it's not. You have

1 to be able to cross-reference multiple materials, make assessments
2 and come to a judgment. That's what I do.

3 Q. I want to talk about sort of your experience generally with
4 the journalism and Networked Fourth Estate. Let me find -- give me
5 one second, sir.

6 Now, in your experience, do journalists encourage anonymity
7 with their sources? What I mean by that is, they try to protect
8 their sources from others, but do they encourage the source to keep
9 anonymity with them?

10 A. It depends on the context. Generally speaking, they want
11 to know the source but it depends on the context. If you're talking
12 about a Deep Throat, not necessarily.

13 Q. But in terms of authentication procedures, one of the ways
14 that you actually do that is by ensuring that you know who's giving
15 you materials, right?

16 A. That is certainly one possible method of authentication.
17 Getting particular bits of information that could only be known by an
18 authentic source and then cross-referencing would be another. There
19 are different methods of authentication. Whether it's in journalism
20 or whether it's in computer security, it doesn't matter. There are
21 simply different methods of authentication. Identity of the source
22 is one. Possession of a verifiable piece of information that is
23 associated with certain knowledge might be another.

1 Q. Now, you spoke earlier about sort of the early part of
2 WikiLeaks, '07 to '08, '09 timeframe and you talked about how there
3 was no question about the authenticity of materials posted by
4 WikiLeaks. Now, do you have any direct knowledge of WikiLeaks'
5 authentication procedures at any time?

6 A. No, I don't. What I was referring to was the truly
7 remarkable -- WikiLeaks was an organization for which there were
8 plenty of people who worried about the authenticity and who would
9 have been perfectly happy to publish instances where WikiLeaks had to
10 retract. What was remarkable and in that regard just as a pure fact,
11 not anything you could manipulate, what was remarkable was that
12 through dozens of publicly reported releases, thousands of releases,
13 there were no significant reports of WikiLeaks having to retract and
14 say, oops, this wasn't authentic, we got hacked. Dan Rather, I'm
15 sure, would have loved to be able to say the same thing for himself.

16 Q. Now, have you ever seen -- in your experience with
17 journalism or otherwise, have you ever seen a journalist tell a
18 source, "Lie to me?"

19 A. Not that I know of.

20 Q. And we talked -- I asked you a number of questions
21 yesterday. I kind of want to go through those now. You would agree
22 that there's a difference between a transparency movement and a
23 journalistic enterprise?

1 A. Yes.

2 Q. A transparency movement seeks institutional change?

3 A. I think in general transparency movement -- any movement
4 would be defined by the functions that it fulfills. And if its goal
5 is to achieve institutional or social change, then I would call it a
6 movement not an act of journalism. But these two are not mutually
7 exclusive. You can have the same organization commit acts of
8 journalism or acts of movement building and movement participation.
9 The two are not -- they're different, they're not mutually exclusive.

10 Q. Along the same lines, you would agree there's a difference
11 between a group of freedom of information activists and a
12 journalistic activist?

13 A. Yes, I would.

14 Q. And you'd agree there's a difference between activism and
15 journalism?

16 A. I think there's a difference between activism and
17 journalism. Although again, there are activists who also perform
18 journalism, and when they perform journalism they're doing
19 journalism. There are journalists who also perform activism. When
20 they're doing that, they're organization. It's not a unique
21 organization or individual identity. It's a behavior.

22 Q. How do you determine when an organization is performing
23 activism over performing journalism?

1 A. I would define journalism as the gathering of news and
2 information relevant to public concern for purposes of its
3 dissemination to the public. When I observe an organization doing
4 that, I would say it's engaged in journalism. When I say the effort
5 to actually change an institution, I would say they're engaged in
6 activism.

7 Q. So that's an interesting question I think we sort of talked
8 about, we'll talk about a little later. But at least with your
9 research and generally speaking, you would agree that sort of actions
10 are more important than what someone says about themselves, right?

11 A. Yes.

12 Q. Sort of trying to evaluate what somebody is doing, you want
13 to look at actions, not what they're saying?

14 A. I think that looking at what an organization does is a more
15 crisp indication of how I would define it than what it says about
16 itself. I think if you're trying to understand a way in which an
17 organization understands itself, then you want to see what it says.
18 But I'm very heavily focused on -- this was why I said I looked at
19 the content of the stories.

20 Q. Right.

21 A. To try to understand what the actual behaviors were.

1 Q. Now, would you also agree that there's a difference between
2 the ideals of a journalist and the ideals of someone seeking maximum
3 political impact?

4 A. Not necessarily. Not necessarily. I think journalism has
5 a broad range. There is a relatively narrow idea of more classical
6 journalism. It's not really classical, it's mid-20th Century,
7 journalism that's very focused on just being a professional. But
8 there's certainly politically oriented journalism. You can talk
9 about ----

10 Q. Would that be like muck-raking journalism?

11 A. Partly muck-raking journalism. For example, if you look at
12 something like *The Nation*, there's a particular view of the world, a
13 particular political world view and reporting that's oriented toward
14 that. It's not you select anything you want. You select things, not
15 simply because they're interesting but because they are relevant to
16 action in a particular political perspective. It doesn't make it not
17 journalism. It makes it a certain kind of journalism, mobilized
18 journalism.

19 Q. The idea is to select things that are newsworthy when
20 you're a journalist?

21 A. No. That's what I'm resisting.

22 Q. Okay.

1 A. I'm saying there are diverse forms of journalism and all
2 the news that's fit to print is one model. And it claims for itself
3 a complete political neutrality. But I don't think that an
4 organization like *The Nation* or an organization like *Fox News* doesn't
5 take political impact of the reporting into consideration of what to
6 report on, how to report and which facts to underline. I wouldn't
7 call *The Nation* or *Fox News* not journalism simply because they don't
8 only do all the news that's fit to print.

9 Q. Now, would you agree that mass document leaking is somewhat
10 inconsistent with journalism?

11 A. No. Why would I agree with that?

12 Q. If there was no newsworthy news locus or nexus there?

13 A. If it had no news and wasn't relevant I might agree but the
14 very fact, it depends on what the -- it depends on what you're
15 looking for. I'll give you an example. The most significant
16 investigative body looking at civilian casualties in the Iraq war,
17 Iraq body count, took the Iraq SIGACTS and did a exposed analysis
18 quantitatively and showed that actually from documents held by the
19 government there was an incongruity between the number of civilian
20 casualties reported by the government in Iraq and the actual number
21 known to the government from these documents. You can't do that with
22 one smoking gun document. The only way you can do that is by mass
23 analysis of lots of documents. So it really depends on the

1 particular form of journalism and the particular form of question,
2 whether what you need is cross-referencing of a very large number of
3 documents, each of which may not by itself make the particular point,
4 but all of which together make an incredibly important point.

5 Q. Well, I'm glad you brought that up because you actually
6 cite that in your paper, right, as one of the noteworthy aspects of
7 the publication of the Iraq war logs was this incongruity between
8 what had been recorded and what was in the logs themselves? So let's
9 talk about that. Are you aware that the significant activity reports
10 are usually written almost contemporaneously with an event?

11 A. No, I wasn't aware of that. But broadly speaking, yes.

12 Q. So I want to go through sort of an example, now, if that is
13 true. Let's take reporting on other sort of events that, where
14 there's sort of casualties, et cetera. Let's talk about the Boston
15 Marathon bomber. Now, you would agree that at least initially there
16 were ----

17 MJ: Yes?

18 CDC[MR. COOMBS]: Your Honor, relevance at this point? I
19 don't know if this is going to be another baseball card thing. But I
20 would say relevance to going down the comparison to something totally
21 unrelated to this case and also just an idea of how much longer the
22 government tends to go because it might be a good time for a break.

1 ATC[CPT MORROW]: A couple more questions and we can break.
2 Where I'm going with this is the sort of the wild variations in
3 what's initially reported about casualties that aren't necessarily
4 related to ill intent or anything else.

5 MJ: All right. I gave you some latitude. I'll give you some
6 latitude as well. Go ahead.

7 **Questions continued by the assistant trial counsel [CPT MORROW]:**

8 Q. So you would agree that at least there were sort of wild
9 variations after the incident in terms of number of casualties and
10 deaths?

11 A. I live in Boston. That's my recollection, too. But I
12 can't tell you that I did it as a matter of research.

13 Q. Now, you wouldn't say that that initial reporting was -- or
14 inaccurate reporting was on purpose necessarily?

15 A. No.

16 Q. Or that news organizations meant to get them wrong?

17 A. Again, this is -- as somebody sitting at home with his kids
18 looking at the news, not as a researcher.

19 Q. Right. Right. So I guess my question is: Do you see what
20 might be sort of the same problems there in terms of describing a
21 motivation to a particular incident or a particular number of deaths
22 when it's based on sort of a firsthand account in time
23 contemporaneously?

1 A. I assume where you're going is that it's possible that the
2 count based on the logs was less accurate than the ultimate count.
3 The point here is a matter of whether the information comes in the
4 context where its political valence is understood or in the context
5 that it's not. The public statements about the number of civilian
6 casualties embody, you're right, a certain cleaning process. But
7 they also embody an understanding of what the politics are of the
8 events. How you define what counts as caused or not caused by the
9 actions will allow you to shrink the results. What we have here was
10 an independent account based on formal documents that allowed for an
11 analysis that was uncorrelated with the analysis that already came
12 with an understanding of its political consequences.

13 So again, as with any context of trying to understand what
14 is the truth of the matter, finding another source that is
15 sufficiently distinct and not tainted by the same problem, which is
16 understanding the political consequences of the reporting, give us a
17 real insight -- us, the public, a real insight into two potential
18 numbers.

19 Now, if you then want to engage in a political debate, no,
20 no, here's why these are wrong and here's why we are right, that's
21 fine. But it's a distinct uncorrelated source of data that gives you
22 a real sense of some confidence of whether or not there's variation,

1 which may or may not be because of political considerations in the
2 definition of what counts as a casualty.

3 In any event, it is journalism. It is a question of what
4 is a news source on a question that is absolutely central to public
5 debate that comes from a different source and gives us a very
6 different picture and forces a public debate over which of the two
7 numbers is right, how they were arrived at. That's a context of
8 journalism going back to your original question where the mass
9 release is what actually gives us this perspective.

10 ATC[CPT MORROW]: Your Honor, if you want to take a break at
11 this time.

12 MJ: Well, is this a good time for both sides to take a break?

13 CDC[MR. COOMBS]: Yes, Your Honor. We would request just an
14 hour and 15 minutes.

15 MJ: Start then at ----

16 ATC[CPT MORROW]: Can you give us one moment, please?

17 MJ: Yes.

18 TC[MAJ FEIN]: Ma'am, the United States requests an hour and 15
19 is fine or whatever variant the court will say; however, we will get
20 back to the Court. We might need additional time in order to show a
21 newly found piece of evidence to Professor Benkler to test his
22 opinion.

1 MJ: If you likely require additional time we can start at 1430
2 if you think you're going to require it.

3 TC[MAJ FEIN]: We think we will, ma'am, but we have to ask the
4 predicate questions during the break.

5 MJ: Any objection to starting at 1430?

6 CDC[MR. COOMBS]: No objection, Your Honor.

7 MJ: Court is in recess until 1430.

8 **[The court-martial recessed at 1245, 10 July 2013.]**

9 **[The court-martial was called to order at 1436, 10 July 2013.]**

10 MJ: The Court is called to order.

11 Let the record reflect all parties present when the Court
12 last recessed are again present in court, and the witness is on
13 witness stand. Captain Morrow?

14 ATC[CPT MORROW]: Yes, ma'am. Just a few more questions.

15

16 **CROSS-EXAMINATION continued:**

17 **Questions continued by the assistant trial counsel [CPT MORROW]:**

18 Q. Professor Benkler, you're still under oath.

19 Professor Benkler, have you ever seen a traditional
20 news organization or journalistic enterprise actively solicit
21 submissions of classified information?

22 A. Not really. I see tips being requested that -- I wouldn't
23 say it's a standard practice broadly soliciting, no.

1 Q. And you've never been an intelligence analyst; is that
2 correct?

3 A. No, I haven't.

4 Q. You served in the IDF, but you weren't in the intelligence
5 field?

6 A. No, I was not.

7 Q. And earlier you spoke about how a lot of the information in
8 the Army counterintelligence document was in open source; is that
9 correct?

10 A. Information that I was able to glean myself from materials
11 that were out in the open, in that regard, yes.

12 Q. But you didn't have access to all of the sources of the
13 documents, the footnotes, for example, you couldn't go back and
14 verify every single source of information?

15 A. Would you like me to talk about the footnotes given that
16 they haven't been unclassified?

17 Q. No. I don't need you to talk specifically about the
18 footnotes, but you didn't have -- you couldn't go back and check
19 every single thing?

20 A. Are you comfortable with my talking about the footnotes?

21 MJ: Let's wait for just a moment.

22 ATC[CPT MORROW]: No. Let's just move on.

23 MJ: I'll just ask the question. Do you have access to them?

1 WIT: I had access to the version that was on-line which included

2 ----

3 MJ: Thank you.

4 **Questions continued by the assistant trial counsel [CPT MORROW]:**

5 Q. I want to read you a quote and get your thought. WikiLeaks
6 described itself as the first intelligence agency of the people.

7 Better principled and less parochial than any governmental
8 intelligence agency, it is able to be more accurate and relevant, it
9 has no commercial or national interests at heart. Its only interest
10 is in the relevant use -- the revelation of the truth. Unlike the
11 covert activities of State intelligence agencies, WikiLeaks relies
12 upon the power of overt fact to enable to empower citizens to bring
13 feared and corrupt governments and corporations to justice. Have you
14 heard that mission statement before or seen it somewhere?

15 A. Probably. I'm familiar.

16 Q. It's somewhat similar to the mission statement of what you
17 spoke about earlier in terms of exposing corruption?

18 A. That version, which was more prominent, emphasized more the
19 standard democratic transparency models rather than this -- how
20 should I put it in a poetic form.

21 Q. In your experience, have you ever heard of a journalist
22 refer to having an intelligence source? Now, journalists have

1 sources, but have you ever heard journalists refer to having an
2 intelligence source?

3 A. I think they just mostly talk about the confidential
4 sources or sources rather specifically intelligence sources.

5 Q. In your experience, have you ever heard of journalists
6 referred to outing a spy in their organization?

7 A. Outing a spy in their organization?

8 Q. Yes. It sounds odd I know but.

9 A. I think it's too hard to describe how people will use
10 rhetoric within very large organizations in very diverse forms.

11 Q. Now, we've talked extensively about how initial reports,
12 not really that extensively, but we're talked about initial reports
13 about the release of Department of State cables was somewhat
14 inaccurate; is that correct?

15 A. Yes.

16 Q. And some press outlets reported that WikiLeaks had released
17 251,287 cables, and now would you agree that that reporting was based
18 on what WikiLeaks was saying about what they had in their possession?

19 A. The reporting was based on what was understood on what was
20 said was in WikiLeaks' possession, yes, but it didn't ----

21 Q. Again, newspapers misreported that. It actually didn't
22 release that many at that time?

1 A. Precisely, that it had been released, that it had been
2 released in unredacted form, neither of which was true.

3 Q. And that was something, at least in that case, in November
4 -- you can back and say that was November 2007, that was something
5 you could independently verify?

6 A. Yes.

7 Q. Now, you're aware now that WikiLeaks released 251,000
8 purported Department of State cables in unredacted form, right?

9 A. Much later.

10 Q. In August of 2011. Professor Benkler, you'd agree that your
11 views on this court-martial are pretty well known; is that correct?

12 A. I have written publicly on this.

13 Q. You wrote an op-ed for the *New York Times* or you co-
14 authored an op-ed on March 7, 2013?

15 A. I did.

16 Q. And that was titled, "Death to Whistle Blowers?"

17 A. Yes.

18 Q. Also March of 2013, you wrote an article for the *New*
19 *Republic*?

20 A. Yes.

21 Q. And that was titled the "Dangerous Logic of the Bradley
22 Manning Case?"

23 A. Yes.

1 ATC[CPT MORROW]: Thank you. Nothing further.

2 MJ: Mr. Coombs?

3 **REDIRECT EXAMINATION**

4 **Questions by the civilian defense counsel [MR. COOMBS]:**

5 Q. I didn't have any redirect until the last two questions. I
6 want to give you an opportunity to explain both of those op-ed
7 pieces. Can you tell the judge what the first op-ed piece was about?

8 A. I wrote an article together with Floyd Abrams who is a
9 leading First Amendment lawyer who represented the *New York Times* in
10 the Pentagon Papers case, because we have this agreement between us
11 on the substance of the specifics of WikiLeaks, we have a different
12 view, but we agreed that it was particularly dangerous to the model
13 of the way in which the free press works. If the threat to potential
14 whistle blowers and leakers was as great as the death penalty or life
15 in prison, and that even people who, like the two of us, disagreed on
16 the merits of the particulars in this case, could agree that the cost
17 that finding PFC Manning guilty of aiding the enemy would impose in
18 terms of the willingness of people of good conscious but not infinite
19 courage to come forward and reveal would severely undermine the way
20 in which leak-based investigative journalism has worked in the
21 tradition of free press in the United States.

22 Q. And then the second piece?

1 A. The second piece was a short more popular version of the
2 deep long article that I gave. I particularly emphasized there, as
3 best I remember, the way in which WikiLeaks did serve a particular
4 journalistic function and the way in which too excessive a punishment
5 would destabilize the balance between transparency and the
6 contribution we get there and the appropriate framework for
7 preventing unauthorized disclosure. And so the concern was that if
8 essentially -- let me back up.

9 The logic I describe -- in what I call the dangerous logic.
10 The logic I describe was that in order to -- once you accept that
11 WikiLeaks is a new journalistic organization, if handing materials
12 over to an organization that can be read by anyone with an Internet
13 connection means that you are handing it over to the enemy, that
14 essentially means that any leak to a media organization that can be
15 read by any enemy and/or in the world becomes automatically aiding
16 the enemy. The dangerous logic is that you essentially exclude the
17 question of, have you actually gone to the enemy? It's enough --
18 that was the logic of the claim that I was criticizing. It's enough
19 that you've given it to a medium that was readable on the Internet
20 for you to immediately move on. And what I wrote was that, that
21 can't possibly be the claim. There has to be something fundamentally
22 more than simply giving to an organization that publishes as a
23 journalistic organization, but is accessible everywhere in the world.

1 CDC[MR. COOMBS]: Thank you. Retrieving from Professor
2 Benkler Defense Exhibit Golf-Golf from the witness and Prosecution
3 Exhibit 45. No further questions.

4 MJ: Professor Benkler, I have a couple of questions.

5 **EXAMINATION BY THE COURT-MARTIAL**

6 **Questions by the military judge:**

7 Q. Early in your testimony you mentioned another leak
8 organization, I believe it began with an L.

9 A. LiveLeak.

10 Q. LiveLeak. What is that?

11 A. Frankly it was -- it's not become a significant
12 organization. I mostly come across it in the context of that story.
13 This was another early leaking organization that had much more of
14 anything goes and anything could be posted. I described it in the
15 context of a *Los Angeles Times* story that was trying to describe
16 WikiLeaks as part of the phenomenon of leaking sites, but then
17 juxtapose these two sites.

18 LiveLeak, to the best of my knowledge, has not really
19 developed into a significant source of insight and the core
20 differentiation between them was that WikiLeaks was more careful in
21 authenticating and more cautious in how it published.

22 Q. Do you consider Liveleaks part of the Fourth Estate?

1 A. I haven't really looked at it closely enough to see. It
2 really would depend on its function. I'm not trying to avoid the
3 answer. I don't want to pretend to know something about a site that
4 I haven't really studied.

5 Q. I'm not suggesting that. I guess in your testimony earlier
6 you talked about Fourth Estate is broad, it now sort of includes
7 bloggers that in traditional newspaper organizations are melding, if
8 you will, and getting information from each other. If a person,
9 anybody, you, me, anyone here in the gallery, had information that
10 they weren't supposed to disclose for some reason or another or was
11 protected, contract bidding information, something like that for
12 example, and put it on an individual blog for the world to see, is
13 that person now a journalist?

14 A. I don't think so. I think that -- well, it depends on the
15 context. If there's a direct violation of that person's duty not to
16 disclose, that doesn't get washed away by the fact that they've
17 disclosed it, but this is the problem of defining the range of the
18 journalist privilege, as the Supreme Court wrote in *Branzburg*, it's
19 the liberty of the press is the right of the lonely pamphleteer with
20 a mimeograph as it is from the metropolitan press with the latest
21 technologies. It's a hard line to draw. You would not -- if someone
22 publishes it in a form that is intended for the public, we see this a
23 little bit with reporters privileges of cases in the Second, Third,

1 and Ninth Circuits where they're working a little bit with questions
2 of people who are doing the research by themselves and end up coming
3 and saying, we can't distinguish between these. We have to treat
4 them for purposes of reporter's privilege where it exists -- in the
5 states where it exists, within that reporter's privilege. That's the
6 line, the place where I would look for the line in those states like
7 New Jersey that have the privilege. It's those line drawing
8 exercises that I think are the most productive for our purposes here.

9 MJ: Thank you. Any follow-up questions based on that?

10 CDC[MR. COOMBS]: No, Your Honor.

11 ATC[CPT MORROW]: No, Your Honor.

12 MJ: Temporary or permanent excusal?

13 CDC[MR. COOMBS]: Permanent excusal.

14 **[The witness was permanently excused and withdrew from the**
15 **courtroom.]**

16 CDC[MR. COOMBS]: Your Honor, the defense rests.

17 MJ: All right. PFC Manning, you have not testified, is that
18 your decision?

19 ACC: Yes, Your Honor.

20 MJ: And the Court was given a list of additional witnesses by
21 the defense. Is it also your decision not to call any of them?

22 ACC: That's correct, Your Honor.

23 MJ: Is the government going to have a rebuttal case?

1 TC[MAJ FEIN]: At this time the government does intend to have a
2 rebuttal case.

3 MJ: We spoke about timing issues at the 802 conference that we
4 held earlier today, and it's my understanding that the government is
5 going to give the defense notice of the rebuttal case on Monday.

6 TC[MAJ FEIN]: Yes, Your Honor. It's one of the few things we
7 planned.

8 MJ: And you owe me the responses to the four motions for the
9 finding of not guilty from the defense?

10 TC[MAJ FEIN]: Yes, ma'am, by C.O.B. Thursday, tomorrow we owe
11 the four responses to that. Monday we have scheduled that the Court
12 will hear argument, if any, on the motions to dismiss R.C.M. 917, and
13 if there is any argument on whether the government's rebuttal case --
14 if the defense has any argument against whether we are inside or
15 outside the scope of the rebuttal.

16 MJ: All right. Then we will be on the record then on Monday at
17 0930; is that correct?

18 TC[MAJ FEIN]: Yes, ma'am.

19 CDC[MR. COOMBS]: Yes, Your Honor. And the defense would request
20 that we can decide an exact time after this session, but a time
21 period in which the government gives us notice of rebuttal on Monday
22 with the witnesses that they intend to call and the exact facts that
23 they are calling those witnesses in order to rebut some fact listed

1 by the defense in this case; but a time for that to occur on Monday
2 and that way from that point forward we could prepare argument and be
3 prepared later that same day to argue.

4 MJ: Why don't we do this, because it may make more sense to
5 start later on on Monday? When we finish here let's take a brief
6 recess and talk about logistics and scheduling so we don't put
7 something out and then change it, and we'll come back on the record
8 and we'll have the definite way ahead.

9 TC[MAJ FEIN]: Yes, ma'am.

10 MJ: And one thing I did want to mention to the defense, two
11 things actually. PFC Manning, if this were a members case, my
12 instructions to the members would be that the accused has an absolute
13 right to remain silent. You will not draw any inference adverse to
14 the accused from the fact that he did not testify as a witness. The
15 fact that he has not testified must be disregarded by you. I intend
16 to follow that instruction.

17 ACC: Thank you.

18 MJ: And the other issue I wish to address with the defense is,
19 there is a footnote in your motion for finding of not guilty for 641
20 that says based on your motion that you haven't contacted a
21 particular valuation expert. You have now until -- we're not going
22 forward until next Wednesday. You have time to do that should you

1 want to and the Court will give you a continuance if you want to do
2 that.

3 CDC[MR. COOMBS]: Yes, Your Honor.

4 MJ: I'm not suggesting in any way how I'm going to rule, I'm
5 just saying that the opportunity is there.

6 CDC[MR. COOMBS]: Yes, Your Honor.

7 MJ: Is there anything else we need to address before we recess?

8 CDC[MR. COOMBS]: No, Your Honor.

9 TC[MAJ FEIN]: No, ma'am.

10 MJ: We'll probably come back. Do you think 15 minutes is about
11 right or do you think we'll need longer than that?

12 TC[MAJ FEIN]: Fifteen minutes.

13 MJ: The Court is in recess until 1500.

14 **[The court-martial recessed at 1454, 10 July 2013.]**

15 **[The court-martial was called to order at 1507, 10 July 2013.]**

16 MJ: The Court is called to order.

17 All parties present when the Court last recessed are again
18 present in court.

19 I believe we have reached a way forward. The plan will be
20 we will reconvene on Monday at 1500, and at that time if the parties
21 want oral argument on rebuttal or the scope of rebuttal, and the four
22 defense 917 motions, we'll do that at that time. Depending on the
23 ruling on rebuttal, if there is going to be a rebuttal case, we will

1 begin on Thursday at 0930. If not, we will have closing argument
2 starting on Tuesday at 0930. So whether we go on Tuesday or on
3 Thursday will not be settled until Monday afternoon. Is that the
4 parties' understanding?

5 CDC[MR. COOMBS]: Yes, Your Honor.

6 TC[MAJ FEIN]: Yes, Your Honor.

7 MJ: And the notice from the government on rebuttal will be at
8 0900 on Monday morning to both the defense and the Court?

9 TC[MAJ FEIN]: Yes, ma'am.

10 MJ: Is there anything else we need to address now?

11 CDC[MR. COOMBS]: No, Your Honor.

12 TC[MAJ FEIN]: No, ma'am.

13 MJ: All right. Court is in recess until Monday at 1500.

14 **[The court-martial recessed at 1509, 10 July 2013.]**

15 **[END OF PAGE]**

1 [The court-martial was called to order at 1512, 15 July 2013.]

2 MJ: the Court is called to order. Major Fein, please account
3 for the parties.

4 TC[MAJ FEIN]: Yes, ma'am, Your Honor. All parties when the
5 Court when last recessed are again present with the following
6 exception, Mr. Chavez, Court Reporter is absent. Mr. Robertshaw,
7 Court Reporter is present [previously sworn]. Also, Your Honor, as
8 of 1449 this afternoon there are 19 members of the media at the Media
9 Operation Center, one stenographer; 25 spectators in courtroom; and
10 10 spectators in overflow trailer.

11 [Pause]

12 MJ: All right. Major Fein, before I ask you about new filings,
13 I just want to put on the record the Court made a second amendment to
14 the draft instructions based on the government's advisal to me they
15 were removing, or no longer pursuing the classified enemy with
16 respect to the Specification of Charge I and Charge I, aiding the
17 enemy. That ruling reads: For the Specification of Charge I, Aiding
18 the Enemy, in violation of Article 104 UCMJ, the government advised
19 the Court it is not offering evidence that PFC Manning knowingly gave
20 intelligence to a classified entity specified in Bates Number
21 00410660-00410664. Accordingly, the Court makes the following
22 amendment in the instruction for the Specification of Charge I at
23 Appellate Exhibit 410, change current instruction; One, that at or

1 near contingency Operation Station Hammer Iraq, between on or about 1
2 November 2009 and on or about 27 May 2010, the accused, without
3 proper authority, knowingly gave intelligence information to certain
4 persons, namely al-Qaeda, al-Qaeda in the Arabian Peninsula, and an
5 entity specified in Bates Number 00410660 through 00410664 classified
6 entity. Amended instruction states: One, that at or near Contingency
7 Hammer Station -- Contingency Operator Station Hammer Iraq, between
8 on or about 1 November 2009 and on or about 27 May 2010, the accused,
9 without proper authority, knowingly gave intelligence information to
10 certain persons; namely al-Qaeda and al-Qaeda in the Arabian
11 Peninsula." So ordered this the day of 15th day July, 2013. It will
12 be marked as the next appellate exhibit in line.
13 [The instruction was marked Appellate Exhibit 604.]

14 MJ: Major Fein, would you like to address the new exhibits that
15 have been filed?

16 TC[MAJ FEIN]: Yes, ma'am. Your Honor, there are five exhibits
17 that have been filed -- appellate exhibits -- since the Court last
18 recessed. First, Appellate Exhibit 599 is the government's response
19 to the defense's motion for a directed verdict for the 641 offenses.
20 Appellate Exhibit 600 is the government's response to defense's
21 motion for directed verdict under R.C.M. 917 for the Article 104
22 offense. And Appellate Exhibit 601 is the government's response to
23 the defense motion for a directed verdict Under R.C.M 917 to the 18

1 U.S.C 1030 offense. Appellate Exhibit 602 is the government's notice
2 of a potential rebuttal case, dated 15 July 2013. And Appellate
3 Exhibit 603 is the defense's reply to the government's response to
4 the defense's motion for a directed verdict under R.C.M. 917 for the
5 641 offenses.

6 MJ: Thank you. Mr. Coombs, I would like to set forth for the
7 record some email traffic that occurred between the defense and --
8 well, between the parties and Court, but directed toward the defense,
9 with respect to the Motion to Dismiss -- or Motion for Finding of Not
10 Guilty under R.C.M 917 for the 1030(a) offense, particularly
11 Specification 13 of Charge II.

12 CDC[MR. COOMBS]: Yes, Your Honor.

13 MJ: All right, the motion itself asks me to dismiss that
14 specification. I noted earlier that PFC Manning had entered a plea
15 to a lesser included offense of the specification, but I wanted to
16 clarify for the record what the defense was asking for.

17 CDC[MR. COOMBS]: Yes, Your Honor. We are only asking that
18 the Court dismiss the greater offense. We are not retracting PFC
19 Manning's plea to the lesser included offense.

20 MJ: All right. Thank you.

21 CDC[MR. COOMBS]: Yes, Your Honor.

22 MJ: Prior to coming on the record today, I met with counsel at
23 an R.C.M. 802 conference, which, once again, is where counsel and I

1 discuss scheduling and other issues that may arise in the cases. And
2 there was some additional email traffic that went back and forth
3 since the last session involving defense had requested access to the
4 transcript of the proceedings. And the government is preparing to
5 provide them some access to what has been prepared thus far. Is that
6 correct?

7 TC[MAJ FEIN]: Yes, ma'am. The United States has asked the
8 court reporters to -- to collate all of the transcripts that have
9 been finished by the pool of court reporters from around the country
10 and put those together. And once an entire session for one 39(a)
11 complete session is completed and compiled. Then we would give that
12 to all parties, including the government, defense and Court.

13 MJ: Thank you. Defense, any issues with that?

14 CDC[MR. COOMBS]: No, Your Honor.

15 MJ: The parties had indicated the government had requested some
16 additional discovery material from the defense pursuant to R.C.M. 914
17 or our equivalent -- military equivalent of the Jencks Act. Major
18 Fein, would you like to set forth for the record what you're asking
19 for and what has transpired?

20 TC[MAJ FEIN]: Yes, ma'am. On Friday afternoon, after the
21 United States finished its filings late Thursday night for the R.C.M.
22 917 motions, we started reviewing and preparing for any potential
23 rebuttal case and realized that the defense referenced during the

1 testimony of Chief Ehresman, in the case -- in the defense's case in
2 chief, a specific email that the defense sent to Chief Ehresman and
3 that Chief Ehresman responded to. So the United States realized,
4 after reviewing its -- its reciprocal discovery, that we never
5 received that email in reciprocal discovery. So understanding that
6 reciprocal discovery traditionally is not *Jencks*, or R.C.M. 914
7 material, we went back through, looked for it, and then we asked the
8 Court over email or gave notice to the Court that we'd be asking
9 today for the defense to produce any remaining R.C.M. 914 *Jencks*
10 material for any of their witnesses that had testified; and
11 specifically that one email and any other similar emails. And then,
12 just to note for the record, the United States has always maintained,
13 with the concurrence of the defense and Court, that statements under
14 R.C.M. 914 do include potential emails that it would be the subject
15 matter -- the statement itself that would -- would qualify as *Jencks*
16 or R.C.M. 914 material, not necessarily being just an email. And
17 that was filed at Appellate Exhibit 270 by the government on 3 August
18 2012. And the United States has always maintained that it could
19 include emails, and, in fact, it's produced emails throughout pre and
20 post -- or not pre and post -- pre and trial discovery that includes
21 emails as part of *Jencks* material. And that was also part of the
22 Court calendars to lay out all this type of material to be disclosed.
23 So the United States ultimately requests that the defense produce all

1 that -- any *Jencks* material, any statements that relates to the
2 testimony of their -- of the witness' testimony. And prior to this
3 session, we did receive the one email that we at least know about
4 that was referenced by Chief Ehresman.

5 MJ: All right. Mr. Coombs?

6 CDC[MR. COOMBS]: Yes, Your Honor. Appellate Exhibit 270 was the
7 government's position on what they would provide to the defense. The
8 defense doesn't believe that *Jencks* applies to emails. However, we
9 did in good faith look at all of our emails with our 8 witnesses to
10 include the -- the 9th witness, Chief Ehresman. We found one email
11 that was responsive potentially to what you -- could consider to be
12 *Jencks* material, and we provided that to the government.

13 MJ: All right. Do we have any outstanding issues with *Jencks*?

14 CDC[MR. COOMBS]: No, Your Honor.

15 TC[MAJ FEIN]: Ma'am, just -- again, for point of clarification,
16 the defense maintained until today that emails weren't included. So
17 if defense has reviewed all their emails and ensured that all of
18 their witnesses then -- then the government's fine with that. But if
19 defense did ascent to this in -- or consent to this in Appellate
20 Exhibit 270, it was put on the record, it was discussed ad nauseam
21 between the parties, and so this is -- although that is correct, this
22 was the government's position, it defined *Jencks* in this trial. So
23 as long as nothing else is out there, Your Honor, then the government

1 absolutely has no issue going forward.

2 MJ: All right. Well R.C.M. 914 defines what material is
3 incorporated into *Jencks*. And it appears an email may or may not be
4 incorporated as the one at issue was turned over. At this point I
5 don't see any need for further litigation. Mr. Coombs, as an officer
6 of the Court, has advised the Court they have looked and there are no
7 additional emails that could potentially be responsive under R.C.M.
8 914. That's right, right?

9 CDC[MR. COOMBS]: That is correct, Your Honor. And much like
10 as the government, as officers of the Court, has said the same; they
11 have emails that they would turn over to the defense.

12 MJ: So the Court sees no additional *Jencks* issues at this
13 point. The parties have filed -- or the defense has filed four
14 separate motions for findings of not -- for the Court to enter
15 findings of not guilty that were addressed earlier. One of those
16 motions -- or two of those motions actually involve the offenses
17 under 18 United States Code, Section 641, and Article 134, which are
18 basically the steal, purloin, or knowingly convert offenses. And
19 there were two footnotes in the defense's filings and the reply.
20 They talked about if the Court was to rule a particular way the
21 defense requested additional filings that they would like to file. I
22 advised the parties that I would like to consider the R.C.M. 917
23 motion with all of the evidence and all of the parties' positions

1 before me at one time. So the procedure that we have worked out is;
2 the defense, by the end of today, is going to file an email outlining
3 their position with respect to the additional issues, as well as the
4 case authority that they are relying on, for both pro and con, I
5 believe you said.

6 CDC[MR. COOMBS]: Yes, Your Honor.

7 MJ: Okay, and then the government has until close of business
8 tomorrow to file any response to that motion. And we will orally
9 argue that motion on Thursday in the morning when we begin. The
10 Court will be prepared to rule on the R.C.M. 917 motions with respect
11 to the aiding the enemy offense and the computer fraud, the
12 Specification -- the Specification of Charge I and Specification 13
13 of Charge II, will be prepared to enter that ruling on the Thursday
14 session. Is there anything else we need to address before we proceed
15 with the oral argument on those motions?

16 CDC[MR. COOMBS]: No, Your Honor.

17 TC[MAJ FEIN]: No, ma'am.

18 MJ: And I note for the record that the defense requested oral
19 argument on all of their 917 motions.

20 CDC[MR. COOMBS]: Yes, Your Honor.

21 MJ: All right. Go ahead.

22 CDC[MR. COOMBS]: Your Honor, what I'd like to do is just talk
23 about the defense's view on the 1030, 917 -- not so much tracking the

1 motion that we filed, but just our view why the 917 should be
2 granted. First, I -- backtracking slightly just to talk about the
3 historical nature of the many filings that we filed on 1030. This
4 would be the third motion to dismiss it. Here's hoping third time's
5 a charm.

6 But I'd like to start off with just talking about the first
7 time that we filed. When we first filed the motion, the issue was
8 over whether or not *U.S. v John*, *U.S. v Rodriguez* line of cases, the
9 Courts follow kind of a broad view of how 1030 is viewed or the
10 narrow view, which is *U.S. v. Nosal*. And in that motion hearing the
11 -- what came out of that was the Court determined that it would
12 follow the narrow version of *U.S. v. Nosal*. And specifically what
13 the Court said was that the term exceeds authorized access is limited
14 to violations of restrictions on access to information, not
15 restrictions on its use. At that time the government avoided a
16 dismissal based upon its representation that it did intend to prove a
17 violation of restriction on access; an accessed based restriction.
18 And the theory of the government kind of shifted at that point from
19 embracing the broad view of *John* and *Rodriguez* to going to a theory
20 which they said PFC Manning used an unauthorized program; Wget, and
21 that program circumvented the normal open, click, save process, that
22 the mass entry performance based database required, and thus, he
23 bypassed, in the government's words, a code based restriction on

1 using Wget. When the government brought that theory, the defense
2 brought its second motion to dismiss. And the defense's position was
3 that there no code based restriction and that this was simply a use
4 authorization restriction, if anything, as opposed to an access
5 restriction. And what came out of that second motion, again, was,
6 because the Court didn't have the benefit of all the evidence, the
7 motion to dismiss was not granted, but importantly the Court talked
8 about the fact that there were other types of restrictions, other
9 than purely code based or technical restrictions; that there could be
10 restrictions that could come from a variety of sources to include
11 regulations, user agreements or command policies. And even though
12 the Court had that position, the Court still maintained that it was
13 following the narrow view of *Nosal*. And so reconciling the two of
14 those, the way defense views, you could have restrictions -- that you
15 could have a code based restriction, you could have a technical
16 restriction, and you could have a restriction on access that is
17 perhaps verbalized or put in written form such that, for an example,
18 of if you had authorization to use a particular computer and your
19 employer said to you, you can go to every place on this computer but
20 this area. Your access is restricted; you cannot go to this area.
21 And if the employer put that in verbal or in a written format, that
22 could be, under the Court's ruling an access restriction. And that's
23 how the Court -- that's how the defense reconciled kind of the Court

1 following the narrow view saying that it's not just limited to code
2 and technical base restrictions, you could have access restrictions.
3 Again, there is a -- as the defense puts it in its motion, that --
4 that can be a slippery slope trying to determine what's the
5 difference between use restrictions and access restrictions, or use
6 restrictions that the government is trying to show or trying to use
7 as access restrictions. But, regardless of how you kind of view
8 that, the -- the government's burden that they still maintained and
9 still had to prove, was that PFC Manning violated an access
10 restriction. And that would be the only way they could prove a 1030
11 offense. And look at the government's response motion. What do they
12 say they need to prove? And they go through kind of their view of
13 how this motion practice shook out. They end up saying, and I quote
14 -- base -- well, basically what they believe -- saying is all they
15 needed to prove is whether Wget was an unauthorized program. That's
16 the extent to which the government believes its burden for them ends
17 once they prove it's an unauthorized program then they have proven
18 their 1030 offense in their view. Well, again, setting aside the
19 fact that we don't believe that evidence has shown that it was an
20 unauthorized program; that the evidence actually showed to the
21 contrary, that people could add or use anything they wanted, and
22 there was confusion between the various individuals and
23 responsibility over what you could and could not do. But let's

1 assume just for argument sake that it was an unauthorized program;
2 that that was not a program you could use on the DCGS-A machine.
3 Even if you assume that, you have to still prove that the use of that
4 violated or circumvented an access based restriction. And where
5 could you find that? Under the defense's view for the use base or
6 code base restrictions, you would find that from the testimony of Mr.
7 Wisecarver, or from the testimony of the other defense witnesses;
8 Colonel Miller or Sergeant Madaras or -- excuse me, the government
9 witnesses; Colonel Miller, Sergeant Madaras or Special Agent Shaver.
10 So let's go through those.

11 Mr. Wisecarver from Department of State testified there was
12 no access restrictions on the Net-Centric Diplomacy Database. He
13 said that there was no restrictions on click, open, and save. In
14 fact, what he testified to was the State Department actually relied
15 upon the receiving agency to put any sort of restrictions on access.
16 And it was the State Department's view that if you had access to the
17 SIPRNET then you had access de facto to the Net-Centric Diplomacy
18 Database. And there was no limitation on what you downloaded, how
19 much you downloaded, what you chose to download. None of that was an
20 access restriction from the Net-Centric Diplomacy Database. Now
21 let's look at the unit. Colonel Miller, Sergeant Madaras -- now Mr.
22 Madaras, and other government witnesses talked about the fact that
23 there was no restriction on the manner in which you saved information

1 from the SIPRNET. You didn't have to click, open and save. No -- no
2 sort of training or any sort of restriction put out on -- that this
3 is the only way that you can access stuff on the SIPRNET. Now,
4 Captain Cherepko, which is who the government brought to bring in the
5 AUP -- first of all, the AUP stands for Authorized Use Policy; so
6 right out of the gate it looks like it's a use type restriction as
7 opposed to access -- access restriction. But let's assume for a
8 moment maybe there was an access restriction within the AUP. Well,
9 if that were the case, we don't know, because the government never
10 produced the AUP. Captain Cherepko was called essentially to say,
11 well, the one in 25-2 looks pretty similar to the one I think we
12 signed. But then even on my cross-examination within minutes of
13 viewing the one in 25-2, he had to have his memory refreshed as to
14 what the terms were within the one that he did review for the
15 government just seconds before my cross. So the government didn't
16 offer any evidence as to an access restriction with an AUP. And
17 there's been no evidence of -- from anyone in the unit that there was
18 any sort of access restriction on how you downloaded information from
19 the SIPRNET. And, again, Mr. Wisecarver said from the Net-Centric
20 Diplomacy Database there was no access restriction.

21 Now we look at another one of the government's witness;
22 Special Agent Shaver. He testified about Wget. And importantly he
23 said Wget was an open source infor -- program that was not, you know,

1 associated with hacking or anything, but from his expertise what he
2 testified to was that Wget would not give you any greater access than
3 you otherwise didn't already have. It would not enable you to
4 download information that you were not previously authorized to
5 download, would not authorize you to see or view information that you
6 were not previously authorized to see or view. So even from a
7 program standpoint, Wget's not even designed to exceed authorized
8 access. So really from the government's position there -- there is
9 absolutely no proof that there was an access restriction. What does
10 the government point to though? Their common refrain is that the use
11 of Wget allowed PFC Manning to systematically harvest information in
12 a rapid format that he otherwise would not be able to do. So
13 essentially their argument boils down to, because the Wget program
14 did it faster than what he could have done humanly possible by doing
15 click, open and save, that must have exceeded authorized access. But
16 importantly there's no evidence to support that position. Again, if
17 Manning wanted to, he could have spent all his time to click, open
18 and save and there could have been no prohibition to that. What this
19 program did, and what Special Agent Shaver said it did, was just
20 automated that process. But again -- sorry -- go ahead, Your Honor.

21 MJ: If -- assume that the evidence shows that Wget is an
22 unauthorized program, is it the defense's position by using Wget to
23 access or to become involved with -- I'll put it that way -- the

1 classified information at issue; the Department of State cables, that
2 that's not an access restriction?

3 CDC[MR. COOMBS]: No, because the -- and the idea -- you're
4 then -- you'd be taking, if that were the position -- I think that is
5 the government's position of under the user agreement, the user
6 agreement said I won't use any unauthorized program. We believe it
7 is an unauthorized program. The use restriction does not morph its
8 way into an access restriction. What you would have, ma'am, is you
9 would have a violation of Article 92 perhaps. And that would be a
10 violation of 25-2 certainly. But you don't have something that goes
11 from a 2-year violation to a 10-year violation just because you used
12 an unauthorized program. If we take it out -- because I -- I believe
13 it's a red herring to think about the speed in which Wget can pull
14 stuff -- let's just assume that PFC Manning used a program that went
15 the same speed as click, open and save; exact same speed, but he used
16 that program, and then the person right next to him, Specialist
17 Jones, decided I'm going to do the same thing you're doing, but I'm
18 just going to do a click, open and save. At the end of the day they
19 each had 100 cables, one would not be a 1030 violation -- this one
20 over here a 1030 violation and this one over here not just by the
21 simple fact that this person chose to use a program that was not
22 authorized. They both had the same access, so it doesn't change the
23 access. What it changes, if at all, is that this person over here

1 committed an Article 92 violation. This person over here did not.
2 But even -- even in that realm we look at the government's testimony,
3 and Greg -- Greg Weaver was the person from 25-2, and we asked him
4 about games, music, video, adding that stuff, is that a problem under
5 25-2? And he responded, you want the regulation answer or do you
6 want reality? And the reality is that even though the regulation may
7 say one thing, the deployed unit does something different. And
8 Colonel Miller backed that up by saying, well, you know, there's some
9 things that if my S-6 came to me; in that case Tom Cherepko, and
10 said, hey, these things are not permitted or not entitled to be done
11 on the -- on the net, I might say, well, what's the -- what's the
12 reason for that? And if I think it's a morale and welfare thing, I'm
13 going to ask up the chain or whatnot to -- to ignore that -- to go
14 ahead and allow, you know, music to be listened to. And we see that
15 actually being done throughout the T-SCIF and through multiple
16 Soldiers saying I added things -- newer versions of a particular
17 program. So if -- if we said like -- for example -- I think the way
18 the testimony would shake out for Mr. Milliman, that he was the only
19 one authorized to add anything. We heard from Specialist Showman and
20 Mr. Madaras that they had PFC Manning add a newer version of mIRC
21 chat on their computer. Mr. Milliman talked about the fact that --

22 MJ: This is Specialist Showman and who?

23 CDC[MR. COOMBS]: Mr. Madaras -- Sergeant Madaras, ma'am. And

1 they talked about the fact that approval for a particular version was
2 for that version. So if you added a newer version on your computer
3 of mIRC chat, then that would be an unauthorized program. So under
4 the government's theory then somebody who obtains information through
5 mIRC chat on their computer, although they're sitting right next to
6 somebody who's also using mIRC chat, but an older version that's
7 approved, one person's committing a 1030 violation and the other
8 person's not. And the reason why that can't be is the exact reason
9 *Nosal*, and all cases that follow it, believe that access restrictions
10 cannot be use restrictions. Access restrictions have to be clear.
11 They actually have to indicate the person is not authorized to do
12 this -- to get to this information because it is the computer that's
13 -- that's being punished -- the use of the computer, not getting the
14 information. So when you're looking at that, then you have to have a
15 clear access restriction. And if the government was going to make an
16 access restriction based upon using the right type of programs, then
17 it has to be clear; that has to be clearly stated somewhere. And
18 there's been no evidence of that anywhere in the government's case
19 other than people saying I don't think Wget -- I've never heard of
20 it. I don't think Wget was authorized.

21 MJ: What is defense's position on what AR 25-2 says with
22 respect to programs -- executable files; whatever you want to call
23 Wget?

1 CDC[MR. COOMBS]: Yeah, when you look at the 25-2, both in the
2 provision that deals with executables, it really doesn't use the term
3 executable. What it uses is like .EXE, .BAT files; and .EXE files,
4 ma'am, are executable files. So when you look at the 25-2 AUP -- the
5 sample AUP, and also the provision charged by the government, it
6 doesn't clearly spell out executable files. But one important thing
7 in there is it has a caveat to the prohibition. And that caveat is
8 without authorization. So these things are not permitted without
9 authorization. And what we have seen in the government's case --
10 just solely looking at the government's case, not considering
11 anything from the defense's, we've seen that there is a lot of
12 difference of opinion as to what was authorized and what was not
13 authorized.

14 MJ: Well, isn't that a conflict in the evidence which goes to
15 the fact-finder?

16 CDC[MR. COOMBS]: True. But when you -- when you're talking
17 about that just goes only to the -- the issue of whether or not this
18 was an authorized program. Whether or not this was an authorized
19 program, as the defense maintains, doesn't impact at all on whether
20 or not PFC Manning might have exceeded his authorized access. The
21 unauthorized program or not is just a use restriction; don't use
22 these types of programs. It's a clear use restriction that *John* and
23 *Rodriguez* case line might say, hey, that -- you could exceed your

1 authorized access. But any court following the *Nosal* line of cases
2 would not. And this Court has indicated it's following the *Nosal*
3 line of cases.

4 MJ: With some caveats.

5 CDC[MR. COOMBS]: With the caveat that you could have
6 something besides a code or technical base restriction. But that
7 restriction then would have to be that an access restriction that's
8 clearly spelled out, otherwise, there's no following the *Nosal*
9 opinion because -- then that would be the exception that swallows the
10 rule. If -- if any sort of use restriction placed upon the computer,
11 you know -- someone could put in an AUP; only use this computer if,
12 you know, if you kneel down and say a prayer, and -- before you then
13 click anything on the computer. And if you fail to do that, you have
14 now exceeded your authorized access -- 10-year offense. Well, this
15 Court clearly would not entertain that type of use restriction, nor
16 would any other court following *Nosal*. *John and Rodriguez* would.
17 They would say an employer can contract the 10-year violation in the
18 use restriction. So even though the defense maintains that should be
19 a code of and -- or technical based restriction in order to prevent
20 going down that slippery slope, if you are going to go over to you
21 can have a verbal or written access restriction, then it has to be a
22 clear restriction. It can't be you used an unauthorized program.
23 And the best example of this is the *Douglas* case cited by the defense

1 in its brief. And important -- two things to -- I guess to point out
2 about the *Douglas Hospital* case; first, it's a civil case. And --
3 and so obviously in a civil case you kind of have fewer concerns
4 about loss of liberty. And even in the civil case, the judge said,
5 no, this is a use restriction that you're trying to -- to turn into
6 an access restriction, but it's not an access restriction. But the
7 second thing is that this case almost is our facts. It is so on
8 point ----

9 MJ: Does it involve classified information?

10 CDC[MR. COOMBS]: It doesn't involve classified, but -- and
11 actually, that was a question by the Court in the defense's case, so
12 I won't go on that. But -- but we don't believe that that makes a --
13 a difference because the government's position in this case is he
14 used an unauthorized program to rapidly harvest what he otherwise was
15 accessed -- had authorized access to, but couldn't do by simple
16 click, open and save. And in the *Douglas Hospital* case the idea was
17 you cannot -- you cannot use -- and, in fact, in their -- and what
18 would be the equivalent of their AUP, they specifically stated that
19 you are not allowed to -- to use or download information to an
20 unauthorized storage devices. And in this instance the doctors that
21 were charged under 1030 had access to the information, but they used
22 an external hard drive in order to save a great deal of information
23 that they otherwise could not have downloaded. And the exact

1 terminology in there was they downloaded information they were
2 otherwise entitled to access onto an extraordinary large unauthorized
3 storage device. And *Douglas Hospital* maintained that this is a
4 violation of 1030. And ultimately what the court said is of course
5 the distinction between an employer imposed use restriction and an
6 access restriction may sometimes be difficult to discern since both
7 emanate from a policy decision by the employer about decisions about
8 who should have what degree of access to employer's computer and
9 stored data once given such access to varying uses to which an
10 employee may legitimately put those computers and data stored in
11 them. But simply stating a limitation on access restriction is an
12 access restriction doesn't convert what is otherwise a use policy
13 into an access restriction. And -- and that's exactly what we have
14 here, but we have even a more deficient case than the *Douglas*
15 *Hospital* case because at least in the *Douglas Hospital* case they had
16 the AUP to point to and say here's what the person signed. But even
17 in that case the court said, look, we're going to reject the idea
18 that this use restriction is somehow an access restriction. They
19 were entitled to access it, you never limited that access, all you
20 said was on our storage devices -- on our -- or -- excuse me, on our
21 computer system don't use extraordinary large storage devices without
22 previous authorization. Much like in this case, do not use any sort
23 of program without authorization. And whether or not PFC Manning had

1 authorization is almost irrelevant. The issue now is does that use
2 restriction turn into an access restriction? And the defense
3 maintains that does not. In fact, no criminal case that has adopted
4 the narrow view of *Nosal* where ----

5 MJ: How many have?

6 CDC[MR. COOMBS]: I'm not for sure -- I'm good but not that
7 good, ma'am. I'm not sure of the exact number ----

8 MJ: Ballpark -- a lot, a little?

9 CDC[MR. COOMBS]: It -- it is about a split-even now because
10 the 4th Circuit -- when *Nosal-1* came out, and *Nosal-1* was more along
11 kind of a *John Rodriguez*, the 4th Circuit disagreed, and then *Nosal*
12 en banc reconsidered. It's still kind of a split area. But I -- I
13 think -- the fundamental underpinnings to -- to the 1030 concern is
14 notice. And -- and I think that is -- I think that's where everyone
15 can kind of agree regardless of where you come out that a person that
16 is using a computer should have some sort of notice that now they --
17 they're potentially facing a 10-year offense. And if there's simple
18 use restrictions that are put into -- usually like 10 - 15-page
19 documents that, I'm ashamed to say as an attorney, I probably don't
20 read before I signed. Certainly Soldiers don't read these things
21 clearly before they sign, and yet when they sign them -- if we're
22 going to say that every one of those use restrictions -- because
23 there's some of them that are as inane as you will not use the

1 computer unless you have updated virus protection installed. You
2 will not use this computer unless you have completed your -- all
3 required training. These are some of the really minor things that
4 are in the AUP that under the government's argument a violation of
5 that -- of -- if I were using my computer and didn't update my virus
6 protection consistent with AUP I just committed a 10-year offense.
7 That's what the *Drew* case was concerned about. And that's what many
8 of the cases that follow *Nosal* are concerned about.

9 MJ: Well, didn't *Drew* involve a lesser included offense without
10 a mens rea?

11 CDC[MR. COOMBS]: It did, Your Honor. But that their -- their
12 main concern initially of -- of the idea that you couldn't premise
13 the -- the greater offense -- the 1030 offense that was initially at
14 issue on the idea that there is no notice in this instance. And that
15 was the constitutional concern. But when you look at -- at the end
16 of the day, the government's proof, even if -- like I said, even if
17 we accept that -- that the program used by PFC Manning was
18 unauthorized -- and let's even go so far as to accept that it was
19 unauthorized and that's exactly -- and he knew it was unauthorized,
20 no one gave him permission, and he used that to download the cables.
21 The government hasn't proven at all an access restriction. The --
22 they kind of want to jump from Point A to Point C without doing Point
23 B. And B would be, okay, we're -- was it a code or technical based

1 restriction that it circumvented? No. Okay, well then -- all right,
2 this Court will look to AUP or perhaps a regulation or some other
3 command policy; do you have one of those things to show me? No.
4 There's nothing in the middle there to say that this was an access
5 restriction. What they can show you is that it may -- may be
6 unauthorized -- an unauthorized program. And that again is an
7 Article 92. And that's what ----

8 MJ: Well, isn't it whether it's an access restriction if it's -
9 - isn't that a question of fact for the fact-finder?

10 CDC[MR. COOMBS]: Well, the access restriction -- I guess
11 whether or not there's some evidence of it, yes. If there is no
12 evidence then -- the defense's position is there has been none, then
13 even though you are the fact-finder in your judge's role now, that's
14 where the 917 should be granted.

15 MJ: So you do agree that there -- the Court is acting basically
16 in two different roles; in the 917, I'm acting under the standard of
17 the rule ----

18 CDC[MR. COOMBS]: Correct, Your Honor.

19 MJ: ---- which is a low one. As the fact -- as a fact-finder
20 I'm finding beyond a reasonable doubt.

21 CDC[MR. COOMBS]: Exactly, Your Honor. So -- I mean, you
22 could be a situation where because of just how low the bar is for
23 917, the government gets over that hurdle, but then hasn't proven

1 beyond a reasonable doubt. But even if this instance they haven't
2 gotten over the hurdle because there's been no evidence. There's
3 nothing that they've offered the Court to say that this was an access
4 restriction; no witness has testified to that. And, in fact, all the
5 witnesses from the government have testified to the contrary. And
6 the most important of which would be Mr. Wisecarver, who would know
7 about access restriction because he's the person they brought to talk
8 about the Net-Centric Diplomacy Database. Or, you know, somebody --
9 the other person that would be their star witness, I guess, would be
10 Captain Cherepko, and, unfortunately they couldn't produce an AUP.
11 But even if they did produce the AUP, and even if we followed the AUP
12 within 25-2, there's no access restriction limitation laid out in 25-
13 2. So -- unless the defense wasn't correctly understanding the --
14 you know, the first ruling and the second ruling by the Court, you
15 know, the defense believe that you're following and the Court still
16 is following the narrow view or *Nosal* with the proviso that you could
17 have these access restrictions in other places, but you've got to
18 have evidence of that.

19 MJ: All right. Thank you.

20 CDC[MR. COOMBS]: Thank you, Your Honor.

21 MJ: Captain Morrow?

22 ATC[CPT MORROW]: Ma'am, this is admittedly a case of first
23 impression. And I'd like to draw the Court's ----

1 MJ: Before you get there, let me ask you a question.

2 ATC[CPT MORROW]: Sure.

3 MJ: Is the government aware -- and I probably should have asked
4 the defense this -- are -- is either party aware of any other
5 1030(a)(1) offense involving classified information?

6 ATC[CPT MORROW]: No, Your Honor.

7 CDC[MR. COOMBS]: Yeah, there is one, Your Honor. I'm drawing
8 a blank on it. But I can look through my notes and get it for you.

9 MJ: Thank you. Yes [speaking to the Assistant Trial Counsel,
10 Captain Morrow].

11 ATC[CPT MORROW]: And to begin, Your Honor, I'd to just draw
12 the Court's attention to its ruling on the renewed motion; so the
13 second motion by the defense to dismiss Specification 13 and 14. And
14 this was cited in the government's brief on this issue, but it bears
15 repeating.

16 [Reading from a document] Restrictions of access to
17 classified information not limited to code base or technical
18 restrictions on access. Restrictions to access to classified
19 information can arise from a variety of sources to include
20 regulations, user agreements, and command policy. Restrictions on
21 access can include manner of access.

22 In this case, Your Honor, the government's contention
23 which, aside from the initial ruling that the Court would adopt the

1 Nosal line of cases versus the John Rodriguez line of cases is that
2 the restriction on access in this case was a restriction on the
3 manner of access to this. And we proffered a theory in that.

4 MJ: What is the government's theory?

5 ATC[CPT MORROW]: Again, Your Honor, the government's theory
6 is that the -- the accused obtained the cables using an unauthorized
7 program; Wget. And that theory was clearly laid out in the --

8 MJ: Was that --

9 ATC[CPT MORROW]: -- brief on the subject. Yes.

10 MJ: -- did he access the cables using Wget or did he already
11 have access to the cables and used Wget to download them?

12 ATC[CPT MORROW]: Say that again, Your Honor.

13 MJ: Did he use Wget to access the cables or did he have access
14 to the cables and use Wget to download them?

15 ATC[CPT MORROW]: Wget didn't -- it didn't bypass some
16 firewall or something between him and the -- and the cables. But
17 Wget was the method of obtaining all the cables. And the government
18 would point to -- defense cites Mr. Wisecarver's testimony for the
19 proposition that there was no access restriction. And the defense
20 made a point with pretty much every government witness to essentially
21 play a game of gotcha with the word access. It's not as simple as
22 that. As the Court noted in its second ruling on this subject,
23 access and use are not mutually exclusive. When we say "acceptable

1 use policy", we're not talking use of the information as that's
2 essentially the defense position -- any time they hear "use" its, oh,
3 government now is claiming again that they're relying on a
4 prohibition of the use of the information. No. Acceptable use
5 policy refers to use of the computer. It's never -- it's never as a
6 simple as that sort of just, you know, they -- in this manner, in
7 this way, he could go -- he could go to the website, he could click
8 on a cable, he could download that cable, and he could use that cable
9 for whatever. And the government is, again, not -- we -- we've
10 stepped away from the theory -- the use theory as the Court
11 instructed. You know, that's not -- the Court was not going to go
12 down that road. But the government has proffered another theory
13 consistent with *Nosal*, which is the most -- essentially the most
14 stringent or the most restrictive case on the subject that included
15 the holding that restriction of access can include the manner of
16 access to the information.

17 MJ: What is the government -- is -- what is the government's
18 position on whether Wget was authorized or not?

19 ATC[CPT MORROW]: The government's position is that Wget was
20 absolutely unauthorized. And I believe ----

21 MJ: And the government believes sees no conflict in the -- in
22 the testimony?

23 ATC[CPT MORROW]: When you parse it out, we didn't see

1 conflict because the government's position is what the defense has
2 cited as conflict, which is that there were music -- people used
3 music, movies, and games, or that people used mIRC chat. Those are,
4 in the defense's words, red herrings.

5 MJ: Why?

6 ATC[CPT MORROW]: We're not -- we're not talking about music,
7 movies, and games. And the defense has -- in those cases has a
8 colorful argument that if we were charging PFC Manning with the
9 loading of unauthorized music on his computer, then we would have a
10 problem because it appears that the command had a at least unwritten
11 policy that it was okay to listen to music on your computer.

12 MJ: What is the difference and where is the evidence the
13 government presented between Wget and a music file? Are they
14 executable files? Or are they different in some respect other than
15 one plays music and the other doesn't?

16 ATC[CPT MORROW]: Well, again, the difference between
17 executables and software is also a red herring. As Special Agent
18 Shaver clearly testified that an executable is software; they are one
19 in the same.

20 MJ: Are both prohib -- what -- what does AR 25-2 prohibit?

21 ATC[CPT MORROW]: I believe pro -- I believe 25-2 prohibits,
22 you know, executable software, freeware, which is something you might
23 get off the internet, and programs. I'd have to go back and look

1 specifically at the provisions of 25-2, but I believe that's what --
2 that's how it's articulated. Additionally, Your Honor, the
3 government's position ----
4 MJ: I guess that's where I'm ----
5 ATC[CPT MORROW]: Sorry.
6 MJ: ---- just -- if AR 27-2[sic] prohibits executable files and
7 programs, and there's evidence that executable files and programs are
8 routinely allowed in -- by the unit on the DCGS-A computer, what's
9 the -- where I'm -- what's the difference between a song and Wget?
10 ATC[CPT MORROW]: Well, Your Honor, I -- I -- the government's
11 position is that music is not an executable file. I'm not sure where
12 that ----
13 MJ: Oh, what about movies?
14 ATC[CPT MORROW]: What's that?
15 MJ: Movies?
16 ATC[CPT MORROW]: I don't believe movies are an executable
17 file either. But.
18 MJ: And where's the evidence that we heard of that?
19 ATC[CPT MORROW]: I'm -- I'd have to get back to you on that,
20 Your Honor.
21 MJ: Okay
22 ATC[CPT MORROW]: Again, you know, the distinction is -- if
23 there was, in fact, a command policy essentially because they were in

1 a deployed environment and, you know, Colonel Miller specifically
2 stated, hey, I want people to be, you know, to use whatever it --
3 whatever is within their essentially possession to remain vigilant
4 and interested in the work. And if one of those things was listen to
5 music while doing their work, that didn't seem to be something that
6 he had a problem with. But, again, that's different than an
7 executable file that in, you know, several witnesses testified about
8 what Wget actually does, including Chief Rouillard, Special Agent
9 Shaver, Mr. Weaver, Captain Cherepko. And the government's position
10 is that they essentially all articulated reasons why it would be
11 entirely appropriate to treat Wget differently than every other file,
12 program, or piece of software that has come up in this case.

13 MJ: What were those reasons?

14 ATC[CPT MORROW]: I refer you to the government's brief on
15 this case, Your Honor. But I'll just highlight it here. [Reading
16 from a document] The testimony of Chief Rouillard stating that he
17 used Wget in his OPFOR capacity for attacking the Army network, and
18 he was specifically authorized to install Wget. Wget is only for
19 individuals who are penetration testers and OPFOR. Testimony,
20 especially in Shaver, Wget downloaded information faster than humanly
21 possible. Testimony of Captain Cherepko; Wget's ----

22 MJ: What difference does that make?

23 ATC[CPT MORROW]: Whether it downloads information faster?

1 MJ: Yes.

2 ATC[CPT MORROW]: I believe it makes a difference on the
3 SIPRNET, Your Honor. That's sort of why we are here today.

4 MJ: Well, what about the testimony we heard earlier that it was
5 -- the computers crashed and it was perfectly fine to download on
6 classified CDs in the SCIF?

7 ATC[CPT MORROW]: Your Honor, that's a theory put forth by the
8 defense. And I don't believe there's any evidence that people were
9 using CDs as back-up systems. That was something raised, and I don't
10 believe anyone else said they used -- they put their entire computer
11 on a CD to back it up. Or any information ----

12 MJ: Well, I don't think anybody said ----

13 ATC[CPT MORROW]: ---- that was otherwise available.

14 MJ: ---- I don't think anybody said that either.

15 ATC[CPT MORROW]: What's that, Your Honor?

16 MJ: But -- I don't think anyone said that either. Was there
17 not testimony that there was no prohibition about downloading on CDs
18 so long as they stayed in the SCIF and were properly marked?

19 ATC[CPT MORROW]: No, I believe that's true. If -- if -- no
20 prohibition, but the reason for downloading CDs was to -- for foreign
21 disclosure operatives to burn information to CDs in order to -- to
22 release classified information to their Iraqi counterparts;
23 classified information that was releasable to Iraqis, that had been

1 vetted from the -- the -- you know, in the system, down from the
2 Division level to the brigade. But that was a specific reason why --
3 and -- obviously -- I mean -- I'm sure that in the SCIF, if you --
4 you know, you have a file and need to burn classified information in
5 the course of your working, and hand it to another analyst in the S-
6 2, I -- there was nothing specifically prohibiting that in the course
7 of your work.

8 MJ: 'Cause -- could Wget be almost beneficial if you had to
9 download for an official reason?

10 ATC[CPT MORROW]: I'm not -- I don't -- I don't necessarily --
11 well, Special Agent Shaver testified that he used in the course of
12 his -- this case, and I believe Special Agent -- I don't want to get
13 into what he would say, but he used it because he was trying to
14 replicate the process by which PFC Manning did something. And,
15 again, that's sort of consistent with what Chief Rouillard said about
16 Wget, which is that he uses it as, you know, in the course of his
17 work as somebody who's doing penetration testing, you know,
18 attacking the Army network, not necessarily using it for all the
19 reasons that might be useful in other content.

20 With respect to the *Douglas* case, Your Honor, just one
21 piece of that. I believe that -- again, that case isn't addressing
22 the manner of access or manner of detainment, it addresses the manner
23 of the storage of the information, which is, again, -- that's why

1 that court specifically was a -- they determined that under those
2 facts that was a prohibition on the using the information, not the
3 manner in which they obtained the information.

4 MJ: Well, what's the different between that case and this case,
5 other than it's a civil case not involving classified information? I
6 mean, what's the government's argument as to why I should not draw
7 the same distinction?

8 ATC[CPT MORROW]: Because that case involved the storage of
9 information. It wasn't the method of obtaining the information. It
10 was merely ----

11 MJ: The method of?

12 ATC[CPT MORROW]: ---- the method of obtaining the information
13 or accessing the information. It was the method of storing the
14 information later.

15 MJ: Back to my original question; did the accused use Wget to
16 access the cables or did he already have access to them and use Wget
17 to pull them out?

18 ATC[CPT MORROW]: Well, it was run -- I mean, you could say
19 that -- I believe you could say that he did use Wget to access the
20 information because he ran it from his desktop. It was a -- it was a
21 program that was run from his desktop. It was under his user name,
22 bradley.manning, and then it -- once he ran the script it went out
23 onto the SIPRNET and grabbed the information or scrapped the website.

1 Again -- I mean, the government wouldn't contend that there was any
2 firewall that Wget prevented or that Wget circumvented, nor does the
3 case law require that.

4 MJ: Your counterpart just stood up.

5 TC[MAJ FEIN]: Could I have a moment, Your Honor?

6 MJ: Yes. That would be Major Fein for the record.

7 [Pause]

8 ATC[CPT MORROW]: What the evidence has shown, Your Honor, is
9 that there wasn't a method for downloading cables in batch from the
10 NCD website in batch. And that was clearly from -- that was clear
11 from Mr. Wisecarver's testimony.

12 MJ: So the evidence has shown there's not a procedure?

13 ATC[CPT MORROW]: That there wasn't a procedure -- that there
14 wasn't any other mechanism in which to download cables in bulk like
15 there was, for example -- and this is raised in the defense motion in
16 the CIDNE database, there was a method to download significant
17 activity reports in batches. So in -- sent in monthly batches once -
18 - you could export all SIGACTS to an Excel file. That was a method -
19 - that was something that was in the system that allowed that sort of
20 bulk downloading. There was not a comparable method of obtaining a
21 large number of cables from the NCD system.

22 MJ: Was there a prohibition for bulk downloading?

23 ATC[CPT MORROW]: A prohibition -- a -- explicit prohibition?

1 MJ: Yes.

2 ATC[CPT MORROW]: No. But the government would argue the --
3 that by virtue of the lack of a design feature in NCD that is an
4 implicit prohibition.

5 MJ: What is the government's view of Wget? What kind of a
6 program executable -- whatever software it is -- and how it got on
7 PFC Manning's computer and where it was?

8 ATC[CPT MORROW]: The evidence has shown that the program was
9 on his desktop under his user profile. It was not run from a CD. It
10 was under the -- his user name; bradley.manning both times. When he
11 redownloaded it, May 4th or May 3rd, and moved it to his SIPRNET
12 computer, it was under his -- on his desktop or under his program --
13 under his profile. And, again, when it was running in the March
14 timeframe it was running -- the evidence showed that it was in the
15 pre-fetch files, which is -- it was in essentially under his user
16 name or his profile.

17 MJ: And I find that evidence where?

18 ATC[CPT MORROW]: The testimony of Special Agent Shaver.

19 MJ: So if I'm understanding the government's position
20 correctly; that was -- Wget was a program -- was it introduced?

21 ATC[CPT MORROW]: It was introduced onto his computer both --
22 on both occasions.

23 MJ: How?

1 ATC[CPT MORROW]: The government's theory is that he
2 downloaded -- well, it was downloaded both times from the NIPRNET,
3 put onto a CD and moved over to is SIPRNET computer. And if you
4 recall, Special Agent Shaver -- the second time we can show
5 essentially the time it was downloaded on the NIPRNET computer, and
6 he should -- remember he -- he was talking about the NIPRNET computer
7 and the Internet Explorer -- Explorer history, he said I can see by
8 this line, you know, I know it was downloaded. He then -- so he saw
9 it download a NIPRNET computer, and then he saw it appear under
10 bradley.manning profile, I believe, either minutes or an hour later
11 or so. He knows it's the same file cause of the hash values match.

12 MJ: What, if any, distinction does the government see in
13 running a program or an executable file from a CD and running it from
14 a user profile?

15 ATC[CPT MORROW]: In this case, Your Honor, I don't think
16 there's a distinction for purposes of 1030. There may be a
17 distinction with respect to the specifications in Charge III that
18 allege introducing software on the computer.

19 MJ: With respect to authorized versus unauthorized?

20 ATC[CPT MORROW]: Whether it was authorized to run from a CD?

21 MJ: Yes.

22 ATC[CPT MORROW]: That's part of our -- I think Captain
23 Overgaard will address that in our rebuttal case, but our contention

1 is that that -- that was not what was authorized -- Mr. Milliman did
2 not authorize that.

3 MJ: Okay.

4 ATC[CPT MORROW]: Subject to your questions.

5 MJ: I have one more.

6 ATC[CPT MORROW]: Okay.

7 MJ: Assume that the DCGS -- Mr. Milliman and the other people
8 involved with the DCGS computers say these kinds of programs are not
9 authorized. And the person's chain of command either says, yes, they
10 are, or, I suppose, tolerates them being on the machines despite the
11 DCGS-A prohibition. Are those programs authorized or not authorized?

12 ATC[CPT MORROW]: Our position, Your Honor, was that -- is
13 that in the case of the DCGS-A computers, which were owned by -- they
14 were -- it was theater owned equipment, not owned by the unit, that
15 the -- Mr. Milliman's authority would control.

16 MJ: And that would be true for junior Soldiers notice that it
17 was authorized or not authorized or does that make any difference?

18 ATC[CPT MORROW]: I believe several witnesses -- I don't
19 believe that makes a difference, Your Honor, but several witnesses
20 testified that, you know, everyone knew that Mr. Milliman was the guy
21 to approach for anything having to do with the DCGS-A computers; he
22 was your man. He was the field FSE, Field Support Engineer, I
23 believe.

1 MJ: Okay. Thank you. I think I've asked all my questions.
2 Oops, before -- oops, I didn't -- Captain Morrow, I got one more.
3 I'm sorry about that.
4 ATC[CPT MORROW]: Oh, darn it.
5 MJ: What is the relevance of the Department of State banner?
6 ATC[CPT MORROW]: That was just to clarify some evidence that
7 had come in through Mr. Wisecarver where it -- it talked about how it
8 wasn't access -- it wasn't a banner that related to the use of the
9 information. The government merely points out that was a
10 mischaracterization of the evidence by accused or by the defense.
11 The use in that banner clearly refers to use of the system itself,
12 not to the use of the information.
13 MJ: Thank you. Mr. Coombs?
14 CDC[MR. COOMBS]: Yes, Your Honor.
15 ATC[CPT MORROW]: The computer being server.
16 CDC[MR. COOMBS]: Just based upon the Trial Counsel's
17 statement, just a couple of issues; *Douglas* was a manner of access
18 case because the manner of access was -- accessing the -- these
19 materials with the external hard drive -- that's -- that's how they
20 accessed the materials and then downloaded and saved them. So it's a
21 -- it's a manner of access case. Music is a violation of 25 -- 25-2
22 as well on a computer system, as well as movies and games. And we
23 did have witness testimony; Captain Cherepko talked about the dangers

1 of that from his position and that being either the music, movies, or
2 games could have a virus contained within them that would make the
3 system susceptible to infiltration. The government talks about the
4 limitations of the Net-Centric Diplomacy Database as far as its kind
5 of programming limitations, I guess, of, in their view, it didn't
6 have a batch or a rowbal [phonetic] type function. The limitations
7 of a particular program do not entail the access restrictions of that
8 program. And we see that all the time when you -- when you use one
9 program on your computer to accentuate another such as -- probably an
10 easy example would be Word. I mean, Word doesn't have the ability to
11 PDF a document, but PDF has the ability to grab a Word document and
12 PDF it. So just because a particular program might not have a
13 particular feature to it, does not without more indicate that that's
14 an access restriction.

15 With regards to the banner, you know, we -- we covered the
16 banner. I didn't put Mr. Wisecarver on the spot, but I just wanted
17 to know anything in that banner indicate access restrictions. And --
18 and he said, no. So our position -- we really don't -- we're not
19 concerned about use restrictions; we're concerned about access
20 restrictions for the purposes of 1030.

21 So he's -- he indicated that there were no access
22 restrictions on the Net-Centric Diplomacy Database. That instead
23 they relied upon the receiving agency to place any sort of

1 restrictions. So, again, if you had access to SIPRNET, you had
2 access to the Net-Centric Diplomacy Database.

3 With regard to how the Wget was on PFC Manning's computer;
4 I think they -- Trial Counsel cleared up that, yeah, that had to be
5 from a CD. And then we heard testimony that you could run an
6 executable from a CD and -- or you could put a shortcut on your
7 desktop. And the shortcut on the desktop could be the program. But
8 you couldn't add it to the ----

9 MJ: Well, the CD would still have to be in place, right?

10 ATC[CPT MORROW]: Your Honor, I believe the -- sorry.

11 MJ: Let him answer my question then I'll get to you.

12 CDC[MR. COOMBS]: Yeah. The -- I think there might be a
13 hybrid of three ways; that you could have it as -- you know, so you
14 have the executable program that you can put on your desktop 'cause
15 you're not adding it to the baseline programs. And we've heard
16 testimony that you would have to admin' privileges to do that. But
17 for your user profile, you could save things to your desktop. So you
18 could put it on your desktop, if you wanted. You could put a
19 shortcut on your desktop that would link to the CD. So, I guess, if
20 you had it in your CD and you clicked the shortcut, it would just run
21 it. Or, what you could do, if you didn't have a shortcut, is open on
22 your computer, my computer, and then see the CD drive, double click
23 that and then double click the executable. So, I think there may be

1 three ways that one could run an executable, but from the defense's
2 position there -- there really isn't any distinction between the
3 three. They're all run the same way.

4 MJ: And that includes transferring from the CD to your user
5 profile?

6 CDC[MR. COOMBS]: Yes, Your Honor. I -- I think ----

7 MJ: And there's no admin' rights that -- well, what -- the
8 evidence was there admin' rights required for that or not?

9 CDC[MR. COOMBS]: No admin' rights for the user profile, but
10 you couldn't add programs as far as to the baseline package of the
11 computer. And that's why -- it's perplexing why the government makes
12 it a point that it's on its user profile, but another user of that
13 same computer couldn't see it 'cause it -- you know, it wasn't part
14 of the main programs; it was only on PFC Manning's user profile -- as
15 if that's somehow nefarious. But that's -- that's the only way you
16 could -- you could do it because you didn't have the ability to add
17 it to the baseline programs where other user could see it. So you
18 only -- it's kind of like for that matter, like if we had multiple
19 users on your computer, ma'am, each with a password, if you saved a
20 particular Word document on your user profile I'm not going to be
21 able to see it when I login because it's not on the whole computer's
22 files. So I just don't see a -- although the government made it an
23 issue, I don't see that as it being an issue.

1 Then, finally, Mr. Milliman testified that he did, in fact,
2 see things on the DCGS-A computers that weren't supposed to be there.
3 And he testified that he couldn't order Soldiers to take it off
4 because they didn't work for him. So there -- there's this kind of
5 pull/push on who actually has the final say on the computers. And
6 Mr. Milliman talked about the fact that initially units thought the
7 computers were theirs, they would try to crack the password, he would
8 have school them up on, hey, these are not computers. And then
9 ultimately, you know, sometimes he would see stuff, but he couldn't
10 order the Soldiers to take it off. But, again, he was the final say
11 for putting new programs on. And if he couldn't -- well, he was the
12 initial person they had to go to, and if he didn't have the
13 authorization or didn't know then he would go up the chain in order
14 to get authorization. So subject to your questions, Ma'am.

15 MJ: Does the government have any clarifications?

16 ATC[CPT MORROW]: The reason I stood up, Your Honor, I don't
17 believe any evidence was introduced in the government's case in chief
18 relating to the running of executables from a CD. So I know we've
19 gotten sort of into that as part of this discussion, but for purposes
20 of 917, it really shouldn't be a consideration.

21 CDC[MR. COOMBS]: I actually think that evidence came from
22 Captain Cherepko. I can double-check. But I believe Captain

23

1 Cherepko talked about the ways in which an executable file could be
2 run.

3 MJ: Well, let me ask you, government, once again, what -- the
4 defense described three ways that a program -- you had to have -- if
5 I'm understanding what the evidence has said correctly and what the
6 parties are arguing, if a program had to be installed on the portion
7 of the computer that was accessible to everyone there had to be
8 administrative rights. Now what about a program just installed or
9 added to your own user profile?

10 ATC[CPT MORROW]: Added to your own user profile there didn't
11 have to be administrator rights. But the reason that that was
12 pointed out in the government's brief was that indicates that neither
13 PFC Manning nor anyone else approached the administrator, Mr.
14 Milliman, to put this under -- make this program -- this apparently
15 very useful program, accessible to everyone who could use the
16 computer.

17 MJ: Was there evidence presented that Soldiers had to do that?
18 I mean, if they were -- if you had to go through Mr. Milliman to get
19 a program installed on the DCGS-A computer that would accessible to
20 everyone, however, there were no administ -- well, first of all, let
21 me ask the government, what's the government's view of the evidence
22 to add a program, be it Wget or anything else, to your user profile,
23 what, if any, technical restrictions were there in doing that?

1 ATC[CPT MORROW]: To run a program like Wget -- Wget as an
2 executable file could be added to -- and I believe not every
3 executable file necessarily can be done this way, but at least with
4 respect to Wget, it could be added to the computer without having
5 administrator privileges.

6 MJ: And did Mr. Milliman or anyone else testify that, yes, you
7 have to go through DCGS-A personnel to add programs to the overall
8 general group, but what about ind -- programs to your own individual
9 user profile that don't require administrative rights?

10 ATC[CPT MORROW]: I don't think there's a distinction there,
11 Your Honor. It's introducing, be it software, executable, whatever,
12 introducing something to the DCGS-A machine. That's -- that's the
13 inquiry.

14 MJ: I don't want to get too far afield here, but if there are
15 administra -- if administrative privileges are required to install
16 something on the general overall computer, was there some reason they
17 weren't required to install programs on user profiles?

18 ATC[CPT MORROW]: I'm sorry. Say that again.

19 MJ: Again, I don't want to get too far afield here.

20 ATC[CPT MORROW]: Okay.

21 MJ: But there -- to install something on the T-drive or
22 someplace accessible to all of the members of the unit ----

1 ATC[CPT MORROW]: Right.

2 MJ: ---- require administrator privileges, would it -- why
3 didn't -- why wasn't there any technical restriction then to adding
4 programs to user profiles?

5 ATC[CPT MORROW]: I don't believe there was administrator --
6 T- drive is essentially a share drive, Your Honor. So anything --
7 any file could be added by anyone to the T-drive.

8 MJ: Okay, well, how would you add one then to -- that can be
9 used by everybody -- the one that required administrative rights?

10 ATC[CPT MORROW]: Well, it depends how -- I think we probably
11 are getting a little far ahead, but it depends on how the program
12 operates; whether it's something that needs -- whether it operates as
13 an executable or whether it operates essentially a traditional
14 program, which would have to be installed on the computer. And
15 usually the installation of something like that requires the
16 administrator privileges because it operates with the -- I'm not a
17 computer expert, but it operates with the system itself in a way that
18 executables don't. I'll just defer to Major Fein or Major Fein; he's
19 more of a computer expert than I am.

20 TC[MAJ FEIN]: Ma'am, the testimony this Court has heard is
21 first from Special Agent Shaver, who distinguished the difference
22 between a regular program that installs on a computer. He said that
23 there's a bunch of, I think his term was "libraries", and those

1 libraries install for all users to use. And you have to have
2 administrator access for that. You also heard testimony from Special
3 Agent Shaver that said a self-executable is self-contained file that
4 has all that information contained within it. And then could be run
5 from any location where its put either on a CD -- could be -- or as
6 the defense witness has -- did testify about, and then -- or in a
7 user profile.

8 To answer your original question to Captain Morrow, you
9 said what restrictions -- physical limitations would there be for an
10 individual who doesn't have administrator rights. You heard from Mr.
11 Weaver, his testimony was is that it is impossible to come up with a
12 policy, both on a computer itself and a policy within an Army
13 regulation that captures every possible scenario of installing every
14 type of file from a Word document to a .EXE, and it takes individual
15 responsibility of following the rules and not installing programs.
16 What everyone has testified about is that Wget was a program; self-
17 executable program. And then from Special Agent Shaver's testimony
18 it was found on his desktop. So that could be -- we could use the
19 word "install", but really what that means is moved; the file was
20 located on his desktop. And because Shaver's testimony was it's a
21 self-contained single file -- it is Wget.exe, it is one file that can
22 moved. So an individual is restricted -- this is what Mr. Weaver
23 testified about; an individual is prohibited under the reg' to

1 introduce software that they are not authorized to introduce. That's
2 an introduction prohibition, and that's what Mr. Weaver testified
3 about. And so that would be the two difference -- although there's
4 no technical restriction, it is still a violation of the regulation
5 to introduce a program.

6 MJ: What is the difference between introducing Wget and
7 introducing a movie?

8 TC[MAJ FEIN]: Well, ma'am, first off, a movie is not a program.
9 And the defense has presented no evidence, and there was definitely
10 no evidence prior to the end of the 917 that a movie is an executable
11 or that a -- or that a video is -- excuse me, a video and movie --
12 music are executables. What you did hear testimony on is that there
13 was program called VLC; a movie and music player -- a player to play
14 movies and music. So movies and music are not executables. Wget
15 was. And that's in the testimony of, again, of Special Agent Shaver,
16 Chief Rouillard, and others.

17 MJ: A VLC ----

18 TC[MAJ FEIN]: Yes, ma'am.

19 MJ: ---- is that something a Soldier can introduce through
20 either CD or put on his user profile without administrative rights?

21 TC[MAJ FEIN]: Ma'am, I could answer that question, but there
22 has been no evidence presented in this Court for 917 that answers
23 that specific question.

1 MJ: No witness testified about that issue?

2 TC[MAJ FEIN]: Correct, ma'am.

3 MJ: Okay.

4 TC[MAJ FEIN]: But if Court would like an answer, I can answer
5 that.

6 MJ: Well, I'm -- I'm basing what I have based on the evidence.

7 TC[MAJ FEIN]: Yes, ma'am.

8 MJ: So, no.

9 TC[MAJ FEIN]: So -- but, no, ma'am. So that has not
10 necessarily been answered. There was testimony in the defense's case
11 about what was on CD. But, again, that's not for purposes of a 917.
12 But it -- but what was testified about was VLC is a movie player;
13 movies and music -- movie and music player, and those are not
14 programs.

15 MJ: Okay. Thank you. Defense, your motion; any final words?

16 CDC[MR. COOMBS]: Yes, Your Honor. Just with regards to the
17 idea of an explicit or implicit prohibition for adding shortcuts or
18 adding programs, the explicit prohibition, that's -- that kind of
19 goes back to the defense's entire position on this, that the
20 government hasn't -- regardless of how you view Wget, the government
21 hasn't offered any sort of access restriction -- evidence of the
22 access restriction for the cables in this instance. What they relied
23 upon is, well, you should know if you are using a not authorized

1 program that that's an implicit access restriction. And here that
2 goes again back to the *Nosal* line of cases that if you're going to
3 premise a 10-year offense on something, the notice requirements are
4 that you need to inform the individual of the access restrictions but
5 -- what they are not allowed to do or go to. And in this case,
6 regardless of whether or not it's an unauthorized program or not, it
7 was not an access restriction for the Net-Centric Diplomacy Database.
8 So really the last bit of the government's argument is going to be
9 relevant to the Article 92 offenses, as opposed to the offenses
10 regarding 1030. We do have evidence of executables being put on the
11 desktop other than Wget; and that's mIRC chat. And those executables
12 by Specialist Showman and Sergeant Madaras say the person that put it
13 on their computer is PFC Manning -- a newer version of that without
14 Mr. Milliman. And then we again have evidence of Mr. Milliman saying
15 that, look, I -- I saw stuff that was unauthorized, but I was not in
16 position to tell the Soldiers what to do because they didn't work for
17 me. So even though Mr. Milliman might have been the civilian
18 contractor that owned the computers, his testimony was that, yeah, I
19 controlled what was put on from a program standpoint -- the big
20 picture program standpoint, but I couldn't control what Soldiers put
21 on their desktop. And that's where Captain Cherepko's testimony
22 comes into play of seeing different things on the T-drive and
23 apparently on other Soldiers' computers where he was advising the

1 brigade command, look, we have unauthorized media on our T-drive and
2 Soldiers are putting on their computers, and that's information
3 assurance problem. And according to Cherepko that problem never was
4 addressed or remedied until the moment they unplugged from the
5 system.

6 MJ: So movies and music; do you agree with the government that
7 they're not executable files?

8 CDC[MR. COOMBS]: I don't profess to be a computer expert.
9 But ----

10 MJ: Well, that the evidence showed?

11 CDC[MR. COOMBS]: Yeah, I believe that -- you know, the idea
12 of executable -- I guess it depends how you view executable. EXE
13 would be the typical executable file. A movie file might have an
14 ending like .WMD or .FLD based upon the type of player that would
15 play it. But if the idea --and the evidence has been that executable
16 file is something that you double click and run. If that is the
17 definition the Court goes with on executable file, based upon the
18 evidence, then music and movies and games are executable files. And
19 Captain Cherepko did say that games certainly were executable files.
20 But anything that you double click and it runs, like a music, movie,
21 like a game, is executable.

22 MJ: One last question. I don't remember -- I asked the
23 government this, and I'm not remembering if I asked you that -- Wget;

1 at what stage of the process did the evidence come out that -- is
2 that a program used to access Department of State files or do you
3 already have access to the Department of State files and Wget then
4 goes to retrieve them?

5 CDC[MR. COOMBS]: Yeah, I don't think the -- I don't think the
6 government offered any evidence on that. As to -- at what stage does
7 Wget get involved? Do you have to be on the Net-Centric Diplomacy
8 Database then say, hey, Wget run and get all this stuff? Or can you
9 be just on your -- your computer, then having not gone to the Net-
10 Centric Diplomacy Database, and somehow point Wget to the Net-Centric
11 Diplomacy Database? There's been no evidence on that. But the
12 issue, I guess, would be -- to resolve the question though would be
13 Special Agent Shaver's testimony that Wget would not give you any
14 greater access to anything that you didn't already have access to.

15 So whether you could somehow point Wget to the database and
16 say, go grab all this when you haven't gone to the database, or going
17 to the database and then saying Wget get everything you see,
18 according to Agent Shaver's testimony, that -- that would make a
19 difference because Wget does not give you greater access to anything
20 that you don't already have access to. So I think the answer to the
21 Court's question would be he already had access. And they used Wget
22 to download it.

23 MJ: All right. Then before we proceed to the Article 104

1 defense motion for a 917, would the parties like a brief recess?

2 CDC[MR. COOMBS]: Yes, Your Honor. Just 10 minutes would be
3 fine.

4 TC[MAJ FEIN]: No problem, ma'am.

5 MJ: All right. Court is recess then till 1640 or 4:40.

6 **[The court-martial recessed at 1635, 15 July 2013.]**

7 **[The court-martial was called to order at 1650, 15 July 2013.]**

8 MJ: Court is called to order. Let the record reflect all
9 parties present when the Court last recessed are again present in
10 court. Are the parties ready to proceed with the Article 104
11 argument?

12 CDC[MR. COOMBS]: Yes, Your Honor.

13 MJ: All right. Go ahead.

14 CDC[MR. COOMBS]: Your Honor, on 1 March 2011, the government
15 preferred the current charges against PFC Manning. And one of those
16 charges, of course, was the Specification of Charge I; the Article
17 104 offense. From that day forward, PFC Manning has been under the
18 pressure of what -- at one time was a death penalty offense until
19 referral, and now is offense that carries with it the possibility of
20 life without parole. The government has avoided previous attempts to
21 have this charge dismissed under the promise that they had evidence
22 to show and prove actual knowledge. Well, the government doesn't
23 have any such evidence and they didn't offer any such evidence to the

1 Court in their case in chief. Instead the government has nothing but
2 perhaps an argument that PFC Manning might have been negligent in
3 giving information to WikiLeaks, and that the enemy might have been
4 able to access it. But there's been no evidence offered by the
5 government to show actual knowledge. And this Court has stated in
6 its ruling that if at trial the government does not prove that the
7 accused knew that by giving intelligence by indirect means he
8 actually knew he was giving intelligence to the enemy, the Court
9 would entertain appropriate motions. And now at this date is the
10 time in which this charge should be dismissed because the government
11 has not offered anything to this Court that would even approximate
12 closely to, let alone, actual knowledge. The government has
13 introduced certain evidence that they want to say is circumstantial
14 proof of actual knowledge. And they point to his military education
15 and training, the training PFC Manning might have received both at
16 AIT and while at Fort Drum and then even during the deployment, for
17 that matter. But none of that evidence goes to show actual knowledge
18 that by putting the information on the internet -- and that's really
19 all he did if he did anything -- and that's give it to the WikiLeaks,
20 then it ultimately goes to the internet -- that that single fact
21 alone would mean he would actual knowledge that the enemy would
22 access it.

23 MJ: Does the nature of the information make any difference?

1 CDC[MR. COOMBS]: In this instance for the 104, no, because
2 the 104 offense just goes with any information. So whether it's --
3 if it's beneficial to the enemy in any way -- so whether it's
4 classified or not does not make a difference. Also, in that would be
5 the idea of whether or not it should be classified or not. But
6 that's, again, not an issue for this Court to consider. The only
7 issue is did he have actual knowledge that by giving this information
8 to WikiLeaks al-Qaeda, or now al-Qaeda in the Arabian Peninsula,
9 would get the information -- actual knowledge. And the reason why
10 that requirement is important is because the 104 offense is designed
11 to punish those people who are either directly or indirectly trying
12 to get information to the enemy.

13 MJ: Well, whoa, whoa, whoa, is that a specific intent offense
14 or is that the knowledge intent?

15 CDC[MR. COOMBS]: It's not a specific intent offense, but when
16 you look at the requirement of the actual knowledge, that is --
17 that's what the 104 offense is designed to address; those individuals
18 who are getting information to the enemy. And here the -- the
19 government has no information to show actual knowledge under 104.
20 And when they have previously argued this point of saying that there
21 would be no difference between giving this information to the New
22 York Times or WikiLeaks, for their purposes, that they would still be
23 pursuing the same type of offense, then we can actually take the

1 whole issue of WikiLeaks out of the equation. Because now the sole
2 issue that the government is really advancing is if you give
3 information to any news organization that is going to publish that
4 information and put it on the internet, now you have actual knowledge
5 that the enemy is going to gain access to that. And by that sole
6 fact alone, and that sole act alone, you should be facing an Article
7 104 offense, which can -- could carry the death penalty. Article 104
8 demands more than that. And the proof that Article 104 demands is
9 that you do have that actual knowledge. Not that you inadvertently,
10 accidentally, or negligently put information out that the enemy may
11 gain access to, but that you actually have actual knowledge. And
12 what proof has the government offered on that? Absolutely none.
13 What they have offered is actually proof to show that he wouldn't
14 have actual knowledge. And what's that proof? That's the ACIC
15 document -- the 2008 ACIC document; the Army's counterintelligence
16 report. That report, which, you know, indicates WikiLeaks.org, an
17 online reference to foreign intelligences services, insurgents or
18 terrorist groups, question mark. That's -- that's the question mark
19 of that report. And within the report we see that -- what
20 intelligence gaps they identify is whether or not the enemy does go
21 to WikiLeaks. And we know from multiple witnesses during the
22 government's case in chief that intelligence gaps are information
23 that we do not know. So what better proof that PFC Manning would not

1 know than the fact that the United States Army doesn't know whether
2 or not the enemy goes to WikiLeaks. And we list that as an
3 intelligence gap; something we do not know. And Sheila Glenn, the
4 expert that came to testify about the ACIC report, after bringing her
5 to that question several times of what is a question mark and what
6 would that entertain to you -- what would that mean to you, something
7 you don't know, and also asking what intelligence gap is, she finally
8 admitted that, yes, an intelligence gap is something we don't know.
9 And that report -- if PFC Manning read the report -- we have
10 information to show that he downloaded it and looked at it at
11 different times as far as actually going to it, but reading that
12 report would highlight that we don't know.

13 MJ: Well, isn't there also key judgment section that says
14 WikiLeaks.org represents a potential force protection
15 counterintelligence, OPSEC, and INFOSEC threat to the Army?

16 CDC[MR. COOMBS]: And when you look at that key judgment
17 section, the -- the important thing there is that within the key
18 judgment it talks about presumed. It must be presumed that -- that
19 they would represent a counterintelligence or a force protection, so
20 -- in this it says in addition it must also be presumed that foreign
21 adversaries will review and access. This goes back to the negligence
22 issue like we're presuming this would happen. So you must presume
23 that the enemy might go to this information and get access to it.

1 But by the very nature of that presumption -- again, a presumption is
2 something that we don't know for sure to be true or not; we're
3 presuming that. And, again, that presumption -- that term within the
4 key judgment may go to recklessness, may go to negligence, but that
5 is not going towards actual knowledge. What the government failed to
6 show through any of their witnesses, that any witness that they
7 brought forward knew that the enemy went to WikiLeaks. Many of the
8 witnesses didn't know what WikiLeaks was. But this is the
9 government's case. They need to prove that somebody knew the enemy
10 went to WikiLeaks. They also didn't offer any evidence regarding PFC
11 Manning and his knowledge. What PFC Manning knew or didn't know.
12 And that's a key fact here, isn't it; what did PFC Manning know?

13 MJ: Well, they're offering circumstantial evidence and the
14 evidence that they have in their brief, right?

15 CDC[MR. COOMBS]: Well, that's circumstantial evidence, yes.
16 And they point to Specifications 1 of Charge II of knowledge -- how
17 you prove knowledge through circumstantial evidence, well, actual
18 knowledge is -- is something more than -- than the circumstantial
19 evidence. Actual knowledge is showing that the person had actual
20 knowledge. They knew that by doing this, this is going to happen.

21 MJ: Is it the defense's position that that can't be proved by
22 circumstantial evidence?

23 CDC[MR. COOMBS]: The defense's position is that if you are

1 going to -- to rely upon circumstantial evidence in this -- and,
2 again, without some sort proof of actual knowledge -- actual showing
3 that by being told that, being -- reading that or knowing that to be
4 true and then doing it again, some sort of proof of actual knowledge
5 would be required for 104. Anything else than that, then what you're
6 doing is you're essentially saying he should have known. You know
7 what, he got that training way back in AIT that talked about
8 counterintelligence, and talked about how the enemy has internet,
9 too. And, oh, he looked at this report that -- that said we don't
10 know for sure, and it's possible, we might presume it, you know, he
11 talked to other people -- he had information on his -- in his
12 computer that showed that he was kind of aware of the threat that
13 internet possesses for the United States government as far as
14 information being on there and the enemy might get access to it, all
15 that stuff is the -- is the slope that Olson says you don't go down
16 when it comes to accident, inadvertently, or negligently. You cannot
17 commit the 104 offense by being negligent. You can commit the 104
18 offense by having actual knowledge though. And the way we see this
19 is -- and the reason why this normally isn't even an issue is you see
20 this in 104 offenses where the accused has gone directly to somebody
21 that he believes or she believes is the enemy and is selling
22 information. And it turned out to be undercover FBI agent or -- or
23 other law enforcement. Or we kept ----

1 MJ: Well, what -- oh, okay. Go ahead. Yes.

2 CDC[MR. COOMBS]: ---- or we catch the individual actually

3 doing that; giving information to the enemy and with the full

4 knowledge. So the -- the World War II, Korea, and Vietnam type cases

5 where you have individuals who were captured, and then they clearly

6 give information to the enemy. Those cases involve a direct giving

7 of information. And this goes back to our earlier 104 conversation

8 of when you're talking indirectly then, then the idea is -- then you

9 are achieving indirectly what you could not, I guess, achieve

10 directly or didn't want to achieve directly for some reason. And

11 when it's indirectly, that's the government's burden then. The

12 government has to then say, you know, what, we've charged indirectly,

13 PFC Manning had the ability undoubtedly to send information directly

14 to the enemy if he wanted to. There's no doubt about that. And he

15 didn't. So we're proving that he indirectly did that. Well, does

16 anyone believe PFC Manning wanted to do that? And I know that's not

17 the burden here, but anyone believe he wanted to do that? The

18 government's own evidence through Adrian Lamo indicated just the

19 opposite; that that was not his intent. That his intent was to get

20 this information out to spark reform, to spark debate. That was his

21 intent. So now you have an individual who his intent is to get

22 information out to spark reform, to spark debate, to get at a

23 discussion on what we're doing and why we're doing certain things.

1 And the government is saying, well, you know, one of those
2 individuals who had access to that information is the enemy. And, in
3 fact, we can show at a later date that the enemy got access to that
4 information because it's on the internet. Well, again, there -- you
5 have to have something more than that. You have to have more than,
6 oh, you know what, you were negligent by putting this out and the
7 enemy ultimately got it. Here's your 104 conviction. You've got to
8 have something that shows actual knowledge; that that was the -- when
9 you put that out, you had actual knowledge you were indirectly giving
10 the information to the enemy. And the reason, again, why this case
11 is different than all others -- and this -- this goes across almost
12 all the other charges -- the 1030 charges to be sure, the government
13 has taken a very, very unique position on -- on almost all of its
14 charges.

15 Captain Morrow got up and said that, you know, this is a
16 first impression type case for the 1030. Well, if Captain Overgaard
17 gets up, she should say the same; this is a case of first impression
18 for the 104 case. No case has ever been prosecuted under this type
19 of a theory; that an individual by the nature of giving information
20 to a journalistic organization would then be subject to a 104
21 offense.

22 MJ: Well, is it the defense's position that it makes any
23 difference what kind of an organization WikiLeaks is?

1 CDC[MR. COOMBS]: It does from the standpoint if the
2 government's trying to verify WikiLeaks and say that because of the
3 nature of giving it to WikiLeaks alone he should have known that the
4 enemy was going to get it. And the only way they could do that, I
5 guess, is pointing to the ACIC document. But the idea of --
6 especially in this country of giving the information, whether it's
7 classified or not, to the press because you believe this information
8 should get out to the public, that would certainly put you at
9 jeopardy for a 793 conviction, and perhaps some other convictions
10 because you might have violated some nondisclosure agreements or
11 otherwise. But when you're talking about an actual aiding the enemy
12 offense, then there's got to be more than that. And should it make a
13 difference? Yes. And the difference should be -- you should be
14 showing actual knowledge that the enemy is going to get it, and that
15 you did that. And really in the defense's position, even though I
16 understand that the Court didn't go as far as we asked for the
17 instructions, but the only way the defense really believes Article
18 104 makes sense in this regard to avoid the very slippery slope of
19 basically punishing people for getting information out to the press
20 to basically put a -- I guess a hammer down on any whistleblower or
21 anybody who wants to put information out, in order to avoid that,
22 then -- there should be evidence to show that your intent -- there

1 should be an intent requirement -- that by using indirectly -- if
2 you're going to go indirectly, that you -- your intent was to use
3 that organization to indirectly get it to the enemy. Much like the
4 cases ----

5 MJ: Whatever should be ----

6 CDC[MR. COOMBS]: Well, the ----

7 MJ: -- are you saying that that's how the Court should read the
8 knowledge prong of the law or that the Court should change the law?

9 CDC[MR. COOMBS]: No, the -- what the defense's position is,
10 is when we look at actual knowledge, then that is -- when we say
11 could it be proved by circumstantial evidence? The defense's
12 position is no; you got -- you got to show actual knowledge that the
13 -- that by giving it to WikiLeaks, New York Times, Washington Post,
14 whoever, that you had actual knowledge the enemy was going to get it.
15 Otherwise, you are basically just interjecting a negligence standard.
16 And *Olson* clearly says you can't have that. So that evil intent --
17 that evil general intent has to be something. And, so, the defense's
18 positions is that the evil general intent -- if you don't want to
19 call it kind of a specific intent, that evil general intent has to be
20 I wanted to use this New York times, Washington Post, WikiLeaks,
21 whoever, to indirectly get it to the enemy because I couldn't on my
22 own. Much like, when you're dealing with the individuals who have
23 sold information for profit to people -- to people who they either

1 thought were the enemy or were, in fact, the enemy, or individuals
2 who because they were captured by the enemy during war time, then
3 started to collaborate with the enemy, there is a clear indication of
4 what you're doing. And that's why we can punish you under 104 with
5 an offense that can take away your life. In this instance what the
6 government is advancing here today -- that the least is extremely bad
7 precedent -- if what happens is you can give information to who you
8 think is a journalistic organization that would publish it, and by
9 the fact that you should have known that the enemy might eventually
10 get it, you can be punished with 104. And we're going -- we're going
11 to use circumstantial type evidence to then say, well, you know, you
12 do have some training, you -- you read something that said they --
13 they potentially might pose a threat, and we don't know for sure if
14 the enemy goes there, and, you know, you were the go-to analyst. So
15 based upon all that, guess what? You get a 104 conviction.

16 MJ: What is the defense's position on the government's provided
17 evidence that PFC Manning was a trained intelligence analyst familiar
18 with pattern analysis and using the CIDNE Iraq database to develop
19 that analysis, and knowing the enemy would do the same thing and
20 sending that very database to be published, what's the defense's view
21 of that circumstantial evidence of knowledge?

22 CDC[MR. COOMBS]: Yeah, I mean -- I think that's a nice yarn
23 drawn by the government that doesn't bear out with any of the

1 evidence. I mean, the evidence that we have is that we have these
2 SIGACTS, and the witnesses who have testified, just using the
3 government's witnesses, it's an historical document. And whether or
4 not the enemy -- there's been no evidence that the enemy has the same
5 intel capabilities as -- as the United States government with trained
6 analysts who go through SIGACTS and create work products that would
7 then indicate, you know, some sort of trend or whatnot. But, you
8 know, what you do have is you've got a -- you've got a SIGACT that's
9 capturing engagement activity with the enemy. So just from a common
10 sense of the evidence that's been put out there, the enemy's fully
11 aware of this. The enemy's engaged us -- they're fully aware of when
12 and how and to what success or nonsuccess of the engagement. And,
13 again, that kind of goes back to the negligence aspect of whether or
14 not this is information that ultimately could be used by the enemy.
15 And if we all agree, let's say, that yes, it could be, and it was bad
16 information, then that's, again, negligence; you shouldn't have put
17 that out because you knew that there was a possibility that the enemy
18 would get it. If the government doesn't have something -- the evil
19 intent, actual knowledge prong that actually means something, and all
20 they have is, you know, you put this out, you -- you knew the enemy
21 might get it, and the enemy ultimately got it, if that's all they
22 need to prove, then, again, when you look at 104, it's not dependent
23 upon classified information or not; it's just information. And, you

1 know, any Soldier who gets up -- and the prime example that the Court
2 might be aware of the Soldier talking to then Secretary Rumsfeld, you
3 know, saying to Rumsfeld, hey, look, we are deploying without proper
4 armor, deploying without, you know, the right equipment. And, you
5 know, we don't think we are prepared. And Rumsfeld said, hey, you
6 fight with the Army that you got, not the one that you wish that you
7 had. That one fact alone -- you know, there were many reporters
8 around who published that, who talked about that, and that became a
9 story for a while, that fact certainly was information that the enemy
10 could take advantage of.

11 MJ: But under that -- your scenario the person would have to be
12 speaking without authority. If he's at a town hall meeting and
13 asking a question, what -- how is that without authority?

14 CDC[MR. COOMBS]: Well, I don't think it would be a "without
15 authority" issue because if he gets up and he starts talking, he
16 might have authority to ask a -- I mean, to answer a question, but
17 certainly doesn't have authority to talk about deficiencies of his
18 unit. And -- and if -- if you take that Soldier out and put PFC
19 Manning in there, and if PFC Manning now says something, you know,
20 hey, you know, and he blurts out a piece of classified information
21 that he thinks the American public should know, with or without
22 authority would not be an issue in that situation. It'd still be
23 information that you put out. And you'd almost have kind of a ipso

1 facto probably analysis of it of this is information that we didn't
2 want you to put out, and so we are going to say you didn't have
3 authority to put that out. And then here's your 104 offense. So,
4 you've got a -- if Soldiers are left to wonder is somebody later
5 going to say I had authority to say this or not? And certainly
6 classified information gives a Soldier notice on what you can put
7 out. And, if a Soldier then says, you know what, I know the
8 classified information, I know I'm not -- I know my nondisclosure
9 agreement. I shouldn't put this out. I feel it's important that it
10 gets out. I'm willing to accept responsibility for it or I'm willing
11 to accept the possible consequences, I want this information out.
12 And that Soldier puts the information out. I think what the Soldier
13 might think he or she could expect is perhaps, you know, various
14 Article 92 violations, 793 -- a creative prosecutor might throw in
15 there 641s, 1030s; depending how you got it, but a 104 offense,
16 without more, that is where you have a problem. And -- and what the
17 government's burden should be is then to show actual knowledge in
18 that generally evil intent, even though it is not a specific intent
19 requirement, would be what the defense argues is the closest thing to
20 -- to arguing that the -- there has to be something more than just he
21 should have known by putting this out. He should have known because
22 of the type of information, or because of training, he should have
23 known the enemy would get it. There has to be something more than

1 just that. Subject to your questions.

2 MJ: All right. Thank you.

3 ATC[CPT OVERGAARD]: Ma'am, on the issue of the definition
4 of knowledge, the government would just like to point the Court and
5 the defense to the definition in the UCMJ of actual knowledge under
6 giving intelligence to the enemy, which is the charge in this case,
7 which states that actual knowledge is required, but may be proved by
8 circumstantial evidence. The government would also request that
9 perhaps the Court could amend the draft instructions to include that
10 instruction in the 104 draft instructions. As it ----

11 MJ: Wait a minute. What are you looking at?

12 ATC[CPT OVERGAARD]: In the UCMJ, ma'am?

13 MJ: Yes.

14 ATC[CPT OVERGAARD]: Article 104, c(5)(c).

15 MJ: That's an evidentiary instruction the Court normally gives
16 in such cases.

17 ATC[CPT OVERGAARD]: Yes, ma'am. And it was included in the
18 knowledge definition in the Spec 1 of Charge II, but it wasn't
19 included in the Article 104. But the Court actually did refer to
20 that in -- in respect to Article 104 in a different appellate exhibit
21 -- in a different ruling that you had, ma'am. And I'm recounting the
22 law in Appellate Exhibit 81, but it was not included in the draft
23 instructions, so.

1 MJ: All right, the draft instructions here talk about elements
2 and definitions.

3 ATC[CPT OVERGAARD]: Yes, ma'am.

4 MJ: Knowledge proved by circumstantial evidence is an
5 evidentiary instruction that is given in virtually every case where
6 knowledge is at issue. So --

7 ATC[CPT OVERGAARD]: Yes, ma'am.

8 MJ: Should this have been a members case, I would have included
9 it.

10 ATC[CPT OVERGAARD]: The government also notes that this is
11 not an issue of first impression. And we've -- we provided the
12 relevant case law on several other occasions. The government's not
13 prepared to brief that again today, but ----

14 MJ: What do you mean this is not an issue of first impression?

15 ATC[CPT OVERGAARD]: This is precedent for charging this
16 type of case, ma'am. And we've provided case law precedent of that.

17 MJ: Is that the case where -- I forgot the name of the case,
18 but where someone was attempting to get information to the enemy by
19 publishing troop whereabouts, I think in the Civil War?

20 ATC[CPT OVERGAARD]: In the newspaper. Yes, ma'am.

21 MJ: In that case, was the accused actually trying to reach the
22 enemy?

23

1 ATC[CPT OVERGAARD]: I don't believe -- I'd have to review
2 the case law, ma'am. I wasn't prepared to brief that today, as we
3 have actually briefed that in the past.

4 MJ: Well, Captain Overgaard, I mean, does the government ----

5 ATC[CPT OVERGAARD]: The government is not contending that
6 the accused should have known. The government is contending that the
7 accused did know. And the government -- it would be nice if we had a
8 videotaped confession saying that I knew by leaking information to
9 WikiLeaks that -- that it would go to the enemy. But we don't have
10 that in this case. And the government offered a mountain of
11 circumstantial evidence, which is recounted in 10 pages of factual
12 information in this brief of the evidence that -- that we did elicit
13 that shows that the accused did, in fact, know that by publishing
14 information -- by leaking information to WikiLeaks, and having it
15 published on the internet, that it was, in fact, going to al Qaeda.

16 MJ: Did -- I've asked this question of the government before
17 and I'll ask it one more time. Does it make any difference if it's
18 WikiLeaks or any other news organization or any other -- well, I
19 shouldn't say any other -- any news organization that -- The New York
20 Times, The Washington Post, The Wall Street Journal?

21 ATC[CPT OVERGAARD]: One moment.

22 [Pause]

23

1 ATC[CPT OVERGAARD]: Ma'am, as I said last time when you
2 asked this question, no, it would not -- it would not potentially
3 make a difference. It would depend on the facts of the case though,
4 ma'am. I mean, in this case we have a trained intel analyst, and we
5 showed evidence specifically that this accused was trained on the --
6 by the military on the enemy, particularly al Qaeda and Osama bin
7 Laden and its use of the internet. The United States showed the
8 accused was trained by the military and the types of information the
9 enemy would be seeking on the internet, and even gave a PowerPoint
10 brief to his own unit on that information. The government showed
11 that the accused was informed of how WikiLeaks.org conducted business
12 by his own searches during the commission of this conduct. And he
13 actually acknowledged in discussions in those chats that the
14 government cited in its brief with Julian Assange and Adrian Lamo
15 that he knew exactly what he was doing in disclosing those -- those -
16 - that charged information, ma'am.

17 MJ: The issue really isn't did the accused know what he was
18 doing when he disclosed the information that it would be published.
19 The information is did he know that by that publication that al-Qaeda
20 and al-Qaeda in the Arabian Peninsula would access it. What's the
21 government's specific information on that?

22 ATC[CPT OVERGAARD]: The government would cite back to its
23 brief, ma'am, that he was trained specifically that al-Qaeda used the

1 internet; that the enemy used the internet to get this information;
2 that the enemy was looking for this specific type of information, and
3 even the government would cite back to the accused's own brief that
4 he gave on that information, which was we need to protect for OPSEC
5 purposes information that was mission critical, dates, times,
6 locations, personnel information, military access, public access,
7 capabilities and vulnerabilities, events, methods, equipment and
8 additional information, ma'am, that he specifically briefed because
9 we need to protect that from. And he said hackers, terrorists, and
10 he gave specific examples of why the information needs to be
11 protected. And that was back in AIT. And after AIT he received
12 additional training.

13 MJ: So my understanding of the government's position -- and
14 you're basically focusing on PFC Manning's individual circumstances
15 and training and experience, and that might distinguish him from
16 someone else in an Article 104 setting who basically had no knowledge
17 of intelligence.

18 ATC[CPT OVERGAARD]: That -- that is absolutely true, ma'am.
19 PFC Manning is distinct from an infantryman or a truck driver because
20 he had all this training. And this was his job. He knew exactly
21 what he was doing. He knew exactly the consequences of his actions.
22 He was trained on that repeatedly. And that's what he did as his
23 daily job. And he briefed on the enemy. He was relied upon to brief

1 on the enemy. He briefed on the information that was in this leaked
2 information. He was relied upon to do that.

3 MJ: What is the government's position with respect to the
4 defense's arguments on the -- what do you call this, again, the
5 report on --the ACIC report with a question mark and the intelligence
6 gaps?

7 ATC[CPT OVERGAARD]: The government would -- would say
8 that's -- that's a great argument for the defense to make in their
9 closing, but for one, the 917 standard is that some evidence, and
10 it's construed in the light most favorable the prosecution, but the
11 other evidence that the prosecution would point you to, ma'am, is
12 that the ACIC document itself -- that it must be presumed that
13 foreign adversaries -- adversaries will review and access any DoD
14 sensitive or classified information posted to WikiLeaks that are --
15 and that access was made even more obvious to the accused than
16 pursuit of WikiLeaks.org was made more obvious to the accused by
17 leaking exactly what he did leak, and putting that information that
18 he knew the accused -- that the enemy was seeking on WikiLeaks.

19 [Pause]

20 MJ: Where in the evidence can the Court find the dates of
21 release or the -- the CID -- CIDNE Iraq and Afghanistan appropriate
22 dates of where and what was found when.

23

1 ATC[CPT OVERGAARD]: Of where the -- when the particular
2 evidence was released, ma'am, by the accused or by WikiLeaks?
3 MJ: What evidence has the government presented and where can I
4 -- where can the Court find it?
5 ATC[CPT OVERGAARD]: The Court's taking judicial notice of -
6 - of some of the release dates.
7 MJ: No, no, not the WikiLeaks release dates.
8 ATC[CPT OVERGAARD]: Okay.
9 MJ: The -- where the CIDNE Iraq and Afghanistan databases --
10 the forensics?
11 ATC[CPT OVERGAARD]: One moment, please, Your Honor.
12 [Pause]
13 ATC[CPT MORROW]: Ma'am, what's the -- what's the question
14 again?
15 MJ: The question is if -- should the Court decide to look at
16 the forensics in this case, where is the -- where can the Court find
17 -- where does the government believe in its presentation of the case
18 that the Court can find evidence of the CIDNE Iraq and Afghanistan, I
19 guess, progression from where it began and how it got to WikiLeaks?
20 ATC[CPT MORROW]: The stipulation of expected testimony of
21 Patrick Hoeffel.
22 ATC[MAJ FEIN]: Prosecution Exhibit 116, Your Honor, has the
23 dates at least when the information was pulled.

1 ATC[CPT OVERGAARD]: And what Mr. Hoeffel did in there,
2 ma'am, was he actually narrowed down based on some of the changes in
3 the -- the SIGACTS and the database to a particular time that it must
4 have been stolen. And that's documented in -- in that stipulation of
5 expected testimony.

6 MJ: Okay. Thank you. What's the government's position with
7 "should have known"? Is that a high enough standard to meet the
8 burden of actual knowledge?

9 ATC[CPT OVERGAARD]: The government is arguing that he did
10 know, ma'am. The government's not ----

11 MJ: I understand that. My question is -- is "should have
12 known" a considera -- is that enough to equal actual knowledge?

13 ATC[CPT OVERGAARD]: One moment, please.

14 [Pause]

15 ATC[CPT OVERGAARD]: Ma'am, the government does not contend
16 "should have known" is included in actual knowledge. Subject to your
17 questions?

18 MJ: I've asked them. Thank you.

19 ATC[CPT OVERGAARD]: Thank you, ma'am.

20 MJ: Any final words from the defense?

21 CDC[MR. COOMBS]: Yes, Your Honor. Well, the government said
22 it would be nice if we had a taped confession. We don't have a taped
23 confession. But they do. They've got the chats between my client

1 and Adrian Lamo. They've got the chats between my client and the
2 person they believe is Julian Assange. They've got multiple emails
3 between my client and other individuals when he talked about the
4 charged releases. And what ----

5 MJ: Was -- has those been introduced into evidence?

6 CDC[MR. COOMBS]: They have. It -- it was between my client
7 and Eric Schmidt. And -- and when you look at that, that's their --
8 their taped confession. And what do you see in that? What you see
9 is him talking about why he did this; to get individuals to talk
10 about this -- to spark reform. Nowhere in there is the conversation
11 is, I know al-Qaeda. Al-Qaeda in the Arabian Peninsula is going to
12 get this information. In fact, nowhere in any of the conversations
13 that the government has -- has admitted does he talk about al-Qaeda,
14 al-Qaeda of the Arabian Peninsula, Osama bin Laden, Adam Gadahn, or
15 any other potential enemy. That's not at all discussed. What is
16 discussed is a single focus of I thought this information had to get
17 out. And I wanted it to spark reform. I was encouraged by the
18 response to the Apache video. That's the type of stuff that's coming
19 out from the taped confession that we have. And -- and that is the
20 circumstantial evidence of his intent. You look at the internet.
21 The government said, look, there's a difference between PFC Manning
22 and an infantryman or a truck driver. Well, infantrymen and now
23 women certainly know that the internet is a big place. Everybody

1 knows that. If you -- if you have any type of computer knowledge,
2 you know the internet is a very vast place and that anyone who has
3 internet connection can go anywhere on that internet. But there are
4 multiple websites out there, and sites that, if you spend your entire
5 life you would never be able to visit. So one of those sites in this
6 case -- that's relevant in this case is WikiLeaks. So now the
7 question is, what evidence do we have that the enemy went to
8 WikiLeaks? We know about the ACIC document, but you also have Shelia
9 Glenn's testimony saying at the time that this was drafted they had
10 no intelligence on whether or not the enemy went to WikiLeaks. And
11 this is, you know, shortly before -- this was in 2008. So this is
12 shortly before the charged misconduct in this case. And this is --
13 and Captain Tooman asked Shelia Glenn about this, like where do you
14 get your information for these type of documents? And sometimes it's
15 a request for them to do something and sometimes they do it on their
16 own. And this was we did it on our own. It wasn't a request by
17 anybody. But every time that they had some sort of intelligence --
18 and they went out everywhere to get all the intelligence to combine
19 in this document, if they had an intelligence source for a particular
20 fact or information, it would be cited in the ACIC document. And
21 when you look at the presumption or anything else, there is no
22 source. And that's because, as Shelia Glenn testified, the United
23 States Army, as of the 2008, the time this was drafted, did not know

1 whether or not the enemy went to WikiLeaks. And, if you are going to
2 ascribe some sort of special knowledge to a junior analyst right
3 outside of AIT, I think you would ascribe a little bit more knowledge
4 to who should be the trained professionals, who had been doing this -
5 - I can't remember now how long Sheila Glenn said she'd been doing
6 this -- but her office -- this is what they do. And they certainly
7 have people slightly more knowledgeable than my client on intel
8 analyst and analysis of information. And they don't know. And yet
9 somehow the government wants you to ascribe knowledge to my client.

10 You know, where is the line -- if you are going to ascribe
11 some sort of special knowledge, where is the line then? And the
12 Court did ask, you know, would -- you know, "should have known" be
13 enough for you? The Court had to -- I mean, the government had to
14 think about that for a moment. And then they came back and said, no,
15 okay. Yeah, we'll agree "should have known" is not enough. So, you
16 know, how far more off that line do you have to go before you say,
17 yes, there's a 104 offense? The defense's position is that *Olson* is
18 the -- the case that would be instructive on this, and that's the
19 general evil intent. That's the line, and then going into actual
20 knowledge. And the government has offered no evidence of that.
21 Every bit of evidence they've offered goes towards the "should have
22 known". And the hindsight is 20/20 type standard. So they're
23 basically trying to punish him for being an intel analyst, going to

1 AIT, and information he should have known. And that's not a 104
2 offense, Your Honor.

3 MJ: All right, thank you.

4 TC[MAJ FEIN]: Ma'am, just a question for clarification. When
5 you asked earlier the dates for the CIDNE databases ----

6 MJ: Yes.

7 TC[MAJ FEIN]: ---- we presume it's because of -- those would go
8 -- that's some of the classified information that the government's
9 alleging was compromised and that would go to aiding the enemy
10 charge. There's two other categories of information. Would the
11 Court want those dates as well --

12 MJ: Yes.

13 TC[MAJ FEIN]: ---- and know where to find them?

14 MJ: Yes.

15 TC[MAJ FEIN]: First, Your Honor, it's the Apache video. And if
16 the Court references PE 127, which is the volumed.txt file

17 MJ: Hold on.

18 TC[MAJ FEIN]: Yes, ma'am.

19 MJ: I've got Apache video -- what is it?

20 TC[MAJ FEIN]: Prosecution Exhibit 127.

21 MJ: Okay.

22 TC[MAJ FEIN]: And that's the volumes.txt mounting data. And
23 that date is 15 February, '10. And then the third, Your Honor, is

1 the Department of State cable information. And there is two
2 different prosecution exhibits to reference there. Prosecution
3 Exhibit 158, which is a classified summary of the Department of State
4 server logs. And Prosecution Exhibit 159, which is an unclassified
5 firewall log summary. And those would show the date 28 March 2010.

6 MJ: Hold on.

7 TC[MAJ FEIN]: Yes, ma'am.

8 MJ: What was 159 again?

9 TC[MAJ FEIN]: Yes, ma'am. 159 is the Department of State
10 firewall log summary.

11 MJ: And the date was?

12 TC[MAJ FEIN]: 28 March 2010.

13 MJ: Okay. I thought you said there were three?

14 TC[MAJ FEIN]: May I have a moment, Your Honor?

15 [Pause]

16 TC[MAJ FEIN]: Ma'am, when I said three, that included CIDNE
17 databases. So the CIDNE databases, the Apache video, and the
18 Department of State cables.

19 MJ: So the CIDNE databases, the Apache -- the CIDNE databases
20 rely on what exhibits and what date?

21 TC[MAJ FEIN]: Ma'am, there's multiple exhibits for the CIDNE
22 databases. But the one the United States offered before was
23 Prosecution Exhibit 116 ----

1 MJ: And what were the dates?

2 TC[MAJ FEIN]: ---- which is the Stipulation of Expected
3 Testimony from Mr. Hoeffel. The dates there, Your Honor, is that the
4 -- the two databases were pulled at different times. First the
5 CIDNE-A database was pulled between 11 -- I'm sorry, I know you're
6 asking for the date -- was 17 January 2010. And the CIDNE-I database
7 was pulled on 3 January 2010.

8 MJ: You said 3 January?

9 TC[MAJ FEIN]: Yes, ma'am, for CIDNE-I.

10 [Pause]

11 MJ: And for the CIDNE-A and I databases, what exhibits --
12 what's the government theory -- what -- I mean, what exhibits has the
13 government offered in advance of that on when PFC Manning allegedly
14 sent them to WikiLeaks?

15 TC[MAJ FEIN]: Yes, ma'am. So, ma'am, the United States would -
16 - it's referenced in the motion, but Prosecution Exhibit -- I'm
17 trying to find the number, Your Honor.

18 ATC[CPT MORROW]: -Your Honor, the government's theory is that
19 that transmission to WikiLeaks occurred sometime at the end of
20 January 2010.

21 MJ: And what ----

22 ATC[CPT MORROW]: That we rely -- rely on the -- the fact that
23 the -- a CD was burned right after the wiping of the computer. Do

1 you recall that testimony from Special Agent Shaver?

2 MJ: So I'd look to Special Agent Shaver's testimony?

3 ATC[CPT MORROW]: To Special Agent Shaver's testimony ----

4 TC[MAJ FEIN]: Yes, ma'am.

5 MJ: Thank you.

6 ATC[CPT MORROW]: ---- that with -- and also with respect to
7 when the -- the yada.cart.ezII was created as a -- one encrypted file
8 that included the Afghan events and the Iraq events.

9 TC[MAJ FEIN]: And, ma'am, that's what we're looking -- so
10 Prosecution Exhibit 92 is the SD card that contained that file and
11 contained those events with the dates of those based off Special
12 Agent Shaver's testimony.

13 MJ: All right, is there -- are there -- anything else that
14 either side would like to state with respect to this motion?

15 CDC[MR. COOMBS]: No, Your Honor.

16 ATC[CPT OVERGAARD]: No, ma'am.

17 MJ: All right, the Court is taking this --these two motions
18 under advisement, and will have -- the plan is to have a ruling by
19 Thursday morning to read before we come on the record. We have one
20 issue left to address, and that is the government's proposed
21 rebuttal. Would the parties like a brief recess before we do that?

22 TC[MAJ FEIN]: Yes, ma'am. And -- and the United States would
23 request a brief 802 during the recess.

1 MJ: All right. Well, how long do you think that all this
2 should take?

3 TC[MAJ FEIN]: 15 minutes, Your Honor, total.

4 MJ: All right, defense?

5 CDC[MR. COOMBS]: Ma'am, we have no objection to that course
6 of action.

7 MJ: All right, why don't we be safe and just make it a 20
8 minute recess. Court is in recess until 10 minutes to 1800 or 6
9 o'clock.

10 **[The court-martial recessed at 1737, 15 July 2013.]**

11 **[The court-martial was called to order at 1802, 15 July 2013.]**

12 MJ: The court is called to order. Let the record reflect all
13 parties present when the court recessed are again present in court.

14 The parties and I held a brief R.C.M. 802 conference before
15 coming on today. That's, once again, a conference where the parties
16 raise issues that may arise during the trial or we discuss scheduling
17 and logistics and put what was discussed on the record at the next
18 open session. Major Fein, I believe the R.C.M. 802 conference
19 involved the email that was given to you by the defense?

20 TC[MAJ FEIN]: Yes, ma'am. The United States asked for the
21 R.C.M. 802 conference in order to give notice to the Court and the
22 defense that the United States was going to request the opportunity
23 to recall Chief Ehresman to -- to, I guess, continue a cross-

1 examination based off this email. We'll get ahold of him, either
2 tonight tomorrow, to determine if it's -- if his testimony would have
3 changed. And, if so, then we would recall him. If not, then we'd
4 continue as is.

5 MJ: Okay. And the email has been marked as an appellate
6 exhibit?

7 TC[MAJ FEIN]: It has not been, ma'am. We'll have it marked
8 right now.

9 MJ: Okay.

10 **[The trial counsel had the document marked Appellate Exhibit 605 by**
11 **the court reporter.]**

12 TC[MAJ FEIN]: Ma'am, it has been marked Appellate 605 [handing
13 the document to the Military Judge].

14 MJ: Okay. Defense?

15 CDC[MR. COOMBS]: Your Honor, our position would be -- of
16 course, we'll wait until the government actually says they -- they
17 are not going to try to call Mr. Ehresman back. But our position
18 would be that that email is not inconsistent with anything they put
19 out in his testimony. We'll have to review the exact testimony from
20 the record. Then, also, it is on such a remote fact that the
21 government should not be allowed to reopen its cross-examination of
22 this witness.

23 MJ: Okay. Government, I -- if you want to recall him on

1 Thursday morning and reopen your case, I'll let you do it.

2 TC[MAJ FEIN]: Yes, ma'am.

3 MJ: Okay. Now at issue we have the prosecution notice of
4 potential rebuttal case. And, defense, I understand you're opposing
5 it in its entirety?

6 CDC[MR. COOMBS]: Yes, ma'am.

7 MJ: Okay, why don't you set forth ---- Yes [speaking to the
8 Civilian Defense Counsel]?

9 CDC[MR. COOMBS]: I thought you were going to direct something
10 to the defense.

11 MJ: No. Okay, government, why don't you put on the record what
12 you want to rebut. Just do witness by witness and then we'll hear
13 from the defense.

14 ATC[CPT OVERGAARD]: Yes, ma'am. Government also notes that we -
15 - as we discussed in the -- we discussed the 404(b) note -- ruling in
16 the Article 802 -- or at the 802, I should say, and it's Appellate
17 Exhibit 287. The government's requesting to ----

18 MJ: So that information is going -- you're going to call --
19 recall Ms. Showman for that information that was discussed to rebut
20 the -- what you have in here basically ----

21 ATC[CPT OVERGAARD]: Yes, ma'am.

22 MJ: ---- the motive evidence? Go ahead.

23 ATC[CPT OVERGAARD]: We're specifically talking about the "act

1 to" that was cited in your Appellate Exhibit 287, ma'am.

2 MJ: May I see Appellate Exhibit 287, please?

3 **[The document has handed to the Military Judge.]**

4 MJ: Thank you.

5 ATC[CPT OVERGAARD]: Ma'am, the United States would like to
6 recall Ms. Showman to rebut the motive evidence the defense elicited
7 from Ms. Lauren McNamara in the February 2009 to the August 2009,
8 which would have been the pre-deployment timeframe. And Ms. McNamara
9 in her testimony said words to the effect of the accused told her
10 that I can apply what I learned to provide -- I can apply what I
11 learned to provide more information to my officers and commanders and
12 hopefully save lives. And defense proffered that they're admitting
13 that for plan and motive for what the accused was intending to do --
14 was intending to do with the information, that he was wanting to help
15 his unit. And Ms. McNamara also said words to the effect of PFC
16 Manning told her that I was concerned with saving the lives of
17 families in foreign countries and other noncombatants and just the
18 families of Soldier and Soldiers themselves in making sure they go
19 home safe. So the government would like to offer the evidence -- the
20 statement -- the 404(b) evidence; "act to" in there, of what Ms.
21 Showman said to her to rebut the accused's plan and motive evidence
22 that was proffered by their -- or that was offered by the defense in
23 their case.

1 MJ: So "Act 2" only?

2 ATC[CPT OVERGAARD]: Yes, ma'am.

3 MJ: Okay. Defense?

4 ADC[MAJ HURLEY]: Pardon me, Captain Overgaard. Ma'am, would
5 it be easier for you if we went sort of witness by witness. You
6 heard the proffer from the government and you have our response?

7 MJ: Yes. Yes. That's what I thought I had said.

8 ADC[MAJ HURLEY]: Oh, I'm sorry, ma'am. I didn't understand
9 that. All right. And I'll just brief here from counsel table if
10 that's okay.

11 MJ: That's fine. That's fine.

12 ADC[MAJ HURLEY]: All right, with respect to the testimony of
13 Ms. Showman; first, we would indicate -- and that we're glad the
14 government has indicated with specificity what facts that they want
15 that were elicited during our case in chief that they wish to rebut.
16 We would point out the specific facts that Ms. Mc -- Ms. McNamara
17 talked about, and you have the chat to use as a guide as you -- as
18 you go through what specific things the -- Ms. McNamara and my
19 client, PFC Manning talked about, and view that evidence in light of
20 the evidence that you understand from Ms. Showman in the 404(b)
21 evidence. That how does that evidence from Ms. Showman -- the 404(b)
22 evidence rebut the 803(3) motive intent plan evidence that we were
23 able to deduce from Ms. McNamara.

1 ATC[CPT OVERGAARD]: The United States would just offer it shows
2 that -- it shows PFC Manning's pre-deployment state of mind in the
3 same time period that was elicited from Ms. McNamara. It shows --
4 directly rebuts that the accused allegedly had some noble motive --
5 the carax -- the defense mode of evidence.

6 MJ: Okay. Well, Major Hurley, this is kind of -- this isn't
7 that hard. I mean, it does rebut it. So I'm going to allow that.

8 ADC[MAJ HURLEY]: Yes, ma'am.

9 MJ: Go ahead.

10 ATC[CPT OVERGAARD]: And the United States also would like to
11 call Specialist Marshal to rebut the motive evidence that the defense
12 elicited from Sergeant Sadtler in the March 2009 deployment time
13 period.

14 MJ: And what is that?

15 ATC[CPT OVERGAARD]: And this -- well, actually this -- the time
16 period is actually contingent upon the next request for rebuttal.
17 Maybe we should skip to that one first?

18 MJ: Wait a minute.

19 ATC[CPT OVERGAARD]: Sorry, ma'am.

20 MJ: You mean a specific SIGACT?

21 ATC[CPT OVERGAARD]: Yes, Ma'am.

22 MJ: You want to go to that next?

23 ATC[CPT OVERGAARD]: Yes, ma'am.

1 MJ: Okay.

2 ATC[CPT OVERGAARD]: That -- I think that'll make more sense
3 actually.

4 MJ: All right. Go ahead.

5 ATC[CPT OVERGAARD]: So the United States asks to recall Special
6 Agent Shaver to discuss a SIGACT dated in the March 2010 time period
7 to expound upon uncontradicted testimony of Sergeant Sadtler that he
8 felt the incident the accused approached him about with the
9 documentation involving Iraqi nationals taking place around December
10 of 2009. The government would like to introduce the SIGACT
11 addressing that particular information, which is dated March 2010,
12 just to provide clarity to the timing.

13 MJ: So if I understand what you're trying to do; Sergeant
14 Sadtler testified that he had come to -- he had deployed on or about
15 December -- didn't remember if it was before or after Christmas, and
16 spoke with PFC Manning sometime -- maybe a month afterwards regarding
17 a particular SIGACT. And you're intending to bring this witness to
18 show the same SIGACT was dated March 2010?

19 ATC[CPT OVERGAARD]: To show when -- when that actually took
20 place -- just to provide clarity on the timing of -- of the
21 particular evidence. It wasn't December 2009 time period, it was the
22 May 2010 time period. The government believes that the timing of
23 this potential evidence as it seems to be proffered by the -- or

1 argued based on their opening, is that defense is trying to offer
2 some evidence to show motive or state of mind. And the government is
3 simply offering that -- that this evidence is relevant because it
4 shows that it didn't take place in the December 2009 time period. It
5 took place after a lot of the misconduct, which is in March of 2010.

6 MJ: Okay. Defense?

7 ADC[MAJ HURLEY]: Ma'am, one second, please.

8 [Pause]

9 ADC[MAJ HURLEY]: The first -- our first comment, ma'am, would be
10 that they had the opp -- they had this information, it was -- the
11 government was well aware of the timing of this information and what,
12 if any, effect it might have had on PFC Manning's state of mind well
13 prior to Sergeant Sadtler taking the stand. So they could have used
14 the SIGACT, they could have admitted the SIGACT in the first place
15 with Special Agent Shaver, and then use the SIGACT with Sergeant
16 Sadtler to better lock it in time. Because now the problem is this;
17 Special Agent Shaver, not a member of 10 Mountain, is going to take
18 the stand, and say, yep, I found this SIGACT, it was among the
19 SIGACTS dated March. And they're going to ask you as trier of fact
20 then to say from your memory, well, Sergeant Sadtler told me it was
21 about this, so this appears to be the same thing -- when there was an
22 opportunity to make it clear to the trier of fact exactly how -- what
23 this evidence was so that the witness, himself, could say yes or no

1 to it. So our objection would be is beyond the scope of the
2 appropriate rebuttal, and its relevance -- this is very ancillary
3 fact, whether something occurred in December of 2009, according to
4 the testimony of Sergeant Sadtler -- assuming that's the correct
5 recitation -- or whether it occurred in March of 2009, you're talking
6 about -- if you at least view it from the government's perspective,
7 just a part of the time period in which the accused was allegedly
8 committing these crimes -- PFC Manning was allegedly committing these
9 crimes.

10 MJ: All right, once again, I disagree. I think it's proper
11 rebuttal to Sergeant Sadtler's testimony. And the motive evidence
12 and the relevance and the time -- when it occurred is relevant. So I
13 will allow that. If either side wants to recall Sergeant Sadtler,
14 feel free to do that as well.

15 ATC[CPT OVERGAARD]: So going back to the previous one, the
16 United States would like to call Specialist Marshal to rebut the
17 motive evidence that the defense elicited from Sergeant Sadtler in
18 the March 2010, which is the deployment timeframe.

19 MJ: And what's he going to tell me?

20 ATC[CPT OVERGAARD]: Specialist Marshal will ----

21 MJ: Or she.

22 ATC[CPT OVERGAARD]: ---- say that -- words to the effect of I
23 would be shocked if you were not telling our kids about me 10 to 15

1 years from now. And that was in May of 2010.

2 MJ: Wait a minute. Say that again.

3 ATC[CPT OVERGAARD]: I would be shocked if you were not telling
4 your kids about me in 10 to 15 years from now.

5 TC[MAJ FEIN]: Ma'am, to clarify, PFC Manning said that to
6 Marshal.

7 MJ: Okay.

8 ATC[CPT OVERGAARD]: And the government offers that ----

9 MJ: And -- yeah, what's the -- what's the ----

10 ATC[CPT OVERGAARD]: ---- the government argues that, again, the
11 defense has offered that there has been some sort of noble motive
12 based on what the accused saw occurring in Iraq. However, this would
13 show completely the opposite. It would show that instead of having a
14 noble motive, he was seeking notoriety. And it goes, again, to
15 motive and his state of mind.

16 MJ: Defense?

17 ADC[MAJ HURLEY]: Yes, ma'am. I guess with respect to this
18 testimony by Specialist Marshal, his testimony that the government
19 indicated has -- the conversation occurred allegedly in May of 2010.
20 The conversation that the ----

21 MJ: March or May?

22 ADC[MAJ HURLEY]: May is what I understood from the
23 government.

1 ATC[CPT OVERGAARD]: The statement to Specialist Marshal was in
2 May 2010.

3 MJ: Oh.

4 ATC[CPT OVERGAARD]: The government's trying to parallel to March
5 2010 occurrence in the SIGACT.

6 MJ: Okay, yes. I'm sorry.

7 ADC[MAJ HURLEY]: So May 2010 is when this conversation
8 occurred allegedly with Specialist Marshal. And the -- the
9 information the government wants to rebut -- the conversation between
10 PFC Manning and Sergeant Padgett occurred in February or March of
11 2010.

12 MJ: Padgett or Sadtler?

13 ADC[MAJ HURLEY]: Sadtler. I think my record with names in
14 this Court is fairly established. With Sergeant Sadtler. Ma'am, I
15 apologize.

16 MJ: That's fine.

17 ADC[MAJ HURLEY]: So we would see that temporal distinction as
18 being beyond the scope of appropriate rebuttal.

19 MJ: Well, let me ask the parties positions on here. Is it the
20 parties recollection that Sergeant Sadtler's statement that he made -
21 - this conversation occurred in March?

22 ATC[CPT OVERGAARD]: No, ma'am, which is why the government
23 wanted to introduce the -- talk about the next one first because the

1 government would first like to elicit that information.

2 MJ: I don't understand what you are trying to do. So Marshal -
3 - Sergeant Sadtler ----

4 ATC[CPT OVERGAARD]: Sergeant Sadtler discussed facts that
5 occurred in regard to a specific event that occurred while deployed
6 that PFC Manning approached him about and that he was -- appeared
7 upset about. Sergeant Sadtler couldn't remember when ----

8 MJ: I -- I understand all of that. I'm looking at a timing.
9 The government alleges this to happen in March?

10 ATC[CPT OVERGAARD]: Yes, Ma'am.

11 MJ: Based on Sergeant Sadtler's testimony?

12 ATC[CPT OVERGAARD]: No, Ma'am. Based on the testimony we will
13 elicit from Special Agent Shaver. And information that's actually
14 already admitted on the SD card, ma'am.

15 [Pause]

16 MJ: Okay. I understand what you're talking about.

17 ADC[MAJ HURLEY]: Ma'am, if I may add another thing.

18 MJ: Yes.

19 ADC[MAJ HURLEY]: The content that we would also submit to the
20 Court is quite different and not appropriate for rebuttal. The
21 content that the -- the conversation that he had with Sergeant
22 Sadtler and the -- and the information that he talked about with
23 Specialist Marshal, the nature of that information is quite

1 different. So I wanted to add that additional bit of information.

2 MJ: Well, you -- government, you've already got the Lamo chats
3 in May of 2010, right?

4 ATC[CPT OVERGAARD]: Yes, Ma'am.

5 MJ: Is this evidence going to provide anything additional that
6 I don't already have with the Lamo chats?

7 ATC[CPT OVERGAARD]: One moment, please, ma'am.

8 [Pause]

9 ATC[CPT OVERGAARD]: Ma'am, the government does believe that this
10 -- this adds to the Lamo chats because this line isn't in Lamo chats,
11 and the defense has just actually argued that the Lamo chats show
12 good motive on the part of the defense for the -- that same time
13 period -- our noble motive.

14 [Pause]

15 MJ: All right, I'll admit this, too. I think it does rebut the
16 motive evidence, and the motive evidence has been raised. So go
17 ahead.

18 ATC[CPT OVERGAARD]: The United States also requests to recall
19 Special Agent Shaver to discuss emails the accused sent to members of
20 the media, as well as WikiLeaks Tweets that were found on the
21 accused's personal Macintosh computer to rebut the evidence offered
22 by the defense that WikiLeaks operated as a journalistic organization
23 and was considered legitimate journalist organization at least by

1 Professor Benkler.

2 MJ: Defense?

3 ADC[MAJ HURLEY]: Yes, ma'am. It's our position that Special
4 Agent Shaver, a computer expert -- that the information that he would
5 elicit would then require a conclusion by the trier of fact. The
6 expertise doesn't match up. Professor Benkler said, in his expert
7 opinion, he does consider WikiLeaks a legitimate news organization.
8 And Special Agent Shaver; that's not the area in which his expertise
9 lays. And the government's been aware for months and we've litigated
10 the notion of whether or not Professor Benkler would testify and this
11 information could have very well come out in the government's case in
12 chief. And they -- they knew and understood its import -- it's not
13 as though they learned first that Professor Benkler's testimony --
14 heard it on the stand, and that caused them to revisit and relook at
15 this information. They knew it all along.

16 MJ: Well, is the standard it could have come out in the case in
17 chief, or is it the standard that the defense brought out information
18 and the government is now bringing information to rebut what the
19 defense brought out?

20 ADC[MAJ HURLEY]: Well, you're -- ma'am, the -- you're right that
21 that adequately describes it. But from the accused's perspective
22 they -- the government was well on notice is what we would say
23 because of the extensive litigation that we did -- because of the

1 notice we provided in October and the extensive litigation that we
2 did about Professor Benkler that they were aware of it, and they
3 could have adduced that evidence, and should have adduced that
4 evidence at this time. And we would ask that in your discretion, you
5 foreclose their ability to put this evidence on now.

6 MJ: Why would they not introduce it in rebuttal to counteract
7 the evidence defense introduced?

8 ADC[MAJ HURLEY]: May I have a moment.

9 [Pause]

10 ADC[MAJ HURLEY]: Ma'am, we would point the Court's attention
11 to a case we'll give you at the close of these proceedings -- *The*
12 *United States v. Murphy*, 33 MJ 323, which is a Court of Military
13 Appeals case. And that indicates -- we cite it for the proposition
14 that a trial counsel who holds back material evidence for possible
15 use in rebuttal to ambush the defense runs the risk that the Military
16 Judge, in the exercise of your control of the Courtroom and your
17 control of the evidence, would foreclose their right -- their ability
18 to put that evidence on.

19 MJ: All right. I'll take this one under advisement and have an
20 opportunity to look at the case.

21 ADC[MAJ HURLEY]: Yes, ma'am. Thank you.

22 ATC[CPT OVERGAARD]: The government would just offer that the
23 government contested the relevance of the majority of Professor

1 Benkler's testimony from day one. So the government didn't know what
2 was going to be elicited and what the Court was going to allow from
3 Professor Benkler. And the government is assuming that defense is
4 going to use that testimony to argue that the accused knew what he
5 did about WikiLeaks. And these particular emails, and these Tweets
6 that are found on his -- his digital media, which is actually already
7 admitted -- these just aren't pulled out of -- would go directly to
8 rebut that.

9 MJ: Okay.

10 ATC[CPT OVERGAARD]: Ma'am, the United States also asks to recall
11 Special Agent Shaver to discuss how Wget was run from the accused's
12 profile on a SIPRNET computer to counteract the testimony of Chief
13 Ehresman that executable files could be run off a disk. And based on
14 some of the questions the Court asked during 917, the government
15 would also add that we would like to call Special Agent Shaver to
16 talk about videos and music files and how they are run as well just
17 to explain and counteract the evidence offered by Chief Ehresman.

18 MJ: So are you asking me to allow Special Agent Shaver's
19 testimony in rebuttal or to reopen your case as part of the R.C.M.
20 917 motion or both?

21 ATC[CPT OVERGAARD]: One moment, Your Honor.

22 [Pause]

23 ATC[CPT OVERGAARD]: Ma'am, the government believes this is just

1 rebuttal evidence as it just will go the clarify that Wget was
2 introduced on the computer. And this -- Special Agent Shaver will be
3 able to show that in his rebuttal.

4 MJ: All right. Defense?

5 ADC[MAJ HURLEY]: Ma'am, first, with respect to the last bit of
6 argument that we had, I apologize for not doing it then, if the
7 defense could just receive the exact Tweets and emails that the
8 government's talking about. We recognize Special Agent Shaver
9 perhaps isn't here today at 1820 to talk about it, but just so that
10 we could start our preparation and just have some understanding of
11 what that -- that information is.

12 Secondly, and to the reason that you called on me just now,
13 it's the position of defense that Special Agent Shaver's already
14 testified about this, unless I misunderstood Captain Morrow's
15 argument when he was talking about the 1030 offense, and Wget, and
16 the uses of Wget, it seemed to me as I was listening to it -- as the
17 defense was listening to it, that this testimony was already covered.
18 He was citing the testimony of Special Agent Shaver for these
19 propositions. There's no need to rebut information, ma'am, that --
20 you're a sophisticated trier of fact, you can be called upon to
21 recall Special Agent Shaver's testimony as, in fact, you have been
22 today. And -- and there's no need to bring him back to say
23 essentially the same thing.

1 MJ: Is Special Agent -- well, first of all, with respect to the
2 discovery, any issues?

3 ATC[CPT OVERGAARD]: No, ma'am.

4 MJ: All right, so that'll be done tonight?

5 ATC[CPT OVERGAARD]: Yes, Ma'am.

6 MJ: Okay. Is he going to -- is Special Agent Shaver going to
7 testify ----

8 TC[MAJ FEIN]: I'm -- I'm sorry, ma'am, just to interrupt; not
9 tonight. We could probably have it done tomorrow. Special Agent
10 Shaver is not around. So we can -- we can ----

11 MJ: You have the Tweets and the -- the information ----

12 TC[MAJ FEIN]: We have -- ma'am, we have copies, but not -- it's
13 not going to be the exact copies that he would be authenticating at
14 trial, so we can provide copies, but not the actual ones. We need him
15 here physically to do that.

16 ADC[MAJ HURLEY]: Ma'am, copies are fine.

17 MJ: Okay.

18 ADC[MAJ HURLEY]: For the purpose of helping us prepare.

19 TC[MAJ FEIN]: Tonight.

20 MJ: They want the information that you're going to use --

21 TC[MAJ FEIN]: They'll have it tonight, ma'am.

22 MJ: -- I don't think they care about the format. Okay. Is
23 Special Agent Shaver going to testify to anything he hasn't testified

1 about already?

2 [Pause]

3 MJ: And as you're answering that, my follow-up question is --
4 because I won't have that in front of me right now, did he do that
5 testimony in classified -- in closed session or did he do it in open
6 session when he addressed these issues?

7 ADC[MAJ HURLEY]: Ma'am, the other thing to discuss is when the
8 Court would want notice of our surrebuttal. And we can table that
9 for whenever that's appropriate to talk about.

10 MJ: We can talk about that. We're going to meet after the
11 trial ----

12 ADC[MAJ HURLEY]: Thanks, ma'am.

13 MJ: ---- or after the proceedings today.

14 ADC[MAJ HURLEY]: Yes, ma'am.

15 [Pause]

16 ATC[CPT OVERGAARD]: Ma'am, we believe that -- the government
17 believes that Special Agent Shaver did actually testify that Wget was
18 run from the accused profile. But based on, you know, the testimony
19 of CW2 Ehresman that executable files can be run on off a disk
20 potentially, and some of the questions from the Court, the government
21 just seeks to recall Special Agent Shaver to further explain and
22 clarify how Wget was run and where it was located.

23 [Pause]

1 MJ: Well, this will be a conditional ruling because it all
2 depends on how I rule on the 917 motion with respect to that offense,
3 because otherwise it's not relevant, right?

4 ATC[CPT OVERGAARD]: It's -- it would still potentially be
5 relevant, ma'am, to unauthorized software in Charge III,
6 Specifications 2 and 3.

7 MJ: Oh, okay. Yes [speaking to the defense].

8 ADC[MAJ HURLEY]: Ma'am, the other thing that we would point
9 the Court's attention to is the testimony of Captain Cherepko, who
10 also testified about how these files could be run from a disk. Just
11 to say that there's a -- the panoply of evidence that the Court can
12 consider in making its findings that already exist in the record and
13 there is no need to call a rebuttal witness for.

14 [Pause]

15 MJ: All right, once again, from the Court's recollection of the
16 testimony, there have been a variety of different witnesses who've
17 testified different things how Wget operates and how its run. So I
18 will allow that.

19 ATC[CPT OVERGAARD]: United States would also like to recall an
20 undetermined at this point, additional forensic investigator or
21 witness to discuss how the WikiLeaks.org website appeared in 2009 and
22 2010 to expound upon and counteract the evidence offered by the
23 defense that WikiLeaks offered it as a journalistic organization

1 elicited through Professor Benkler.

2 MJ: So Special Agent Shaver can't testify about that?

3 ATC[CPT OVERGAARD]: No, Ma'am.

4 MJ: Yes [speaking to the defense].

5 ADC[MAJ HURLEY]: One, the defense just expresses its
6 frustration that we're talking still about a mystery guest that we
7 can't identify -- we're talking still about mystery guest, ma'am, we
8 can't identify with any specificity who this witness is that is going
9 to talk about how the WikiLeaks website appeared in 2009 and 2010.
10 The government's indicated there today, again, it's the position of
11 defense, ma'am, we -- we're moving this argument around, but it's the
12 position of the defense that they've had months. They were -- they
13 knew why we ultimately wanted to get Professor Benkler in here to
14 talk. And they could have, certainly if nothing else, identified a
15 witness in this rebuttal document as to how they were going to
16 counteract that testimony. So that would be our first objection is
17 that you foreclose the opportunity because this is the notice they
18 had, this is the time they had to file it, and if they can't identify
19 anyone, ma'am, then they should not be allowed to call this
20 individual.

21 Second, we would submit to you there's evidence about how
22 the WikiLeaks website appeared in 2009 and 2010 already in the record
23 that we've gone through, discussed, objected, filings on, and has

1 been produced. It's here or it's not here. That's sufficient. And
2 whoever this witness is, whatever they might say, is not relevant for
3 the Court's consideration. Thank you.

4 MJ: Okay. Well, first of all, let's talk about the defense's
5 first objection. I mean, you have had -- you have had -- you've had
6 more than a month -- we'll you've had months since we litigated the
7 Motion to Compel Professor Benkler.

8 ATC[CPT OVERGAARD]: Yes, ma'am. How ----

9 MJ: Why are we here now?

10 ATC[CPT OVERGAARD]: However, the government did not know how
11 much testimony the Court would allow from Professor Benkler. And how
12 you ----

13 MJ: That means you do no preparation and you wait until when
14 you get the relevance ruling and then you start?

15 ATC[CPT OVERGAARD]: Ma'am, the government did not know how much
16 the Court was going to allow Professor Benkler. And the government
17 has contested the relevance of any of his testimony since day one.

18 MJ: All right. What's your second objection? I mean, what's
19 your second -- or your position with respect to the second basis by
20 the defense that basically the most wanted list and the Tweets are
21 already in evidence?

22 ATC[CPT OVERGAARD]: The government would say that -- that that
23 is some evidence of what was on WikiLeaks.org website, but there is

1 more evidence of what appeared on the home page, for example, that
2 would still inform and counteract the evidence offered that WikiLeaks
3 operated as a journalistic organization. And the government agrees
4 that if the government does not have this witness by Thursday, we are
5 foreclosed from moving forward. However, until that time, government
6 would just request some -- some latitude, and we had one business day
7 since the defense's case closed.

8 ADC[MAJ HURLEY]: Again, with respect to Captain Overgaard, I
9 find that statement disappointing. The government's had much more
10 time than that. And they -- they can make an assumption. FM 101-5-1
11 asks Army officers to make assumptions every day. This is a
12 legitimate assumption, and they could vet it or not vet it. And
13 that's a frustration. Ma'am, the -- the other thing that we would
14 want to talk about is -- at least what the government could describe
15 for us today, not 72 hours from now, but today, is what they believe
16 this evidence could be. It's an admonition. It's a mission
17 statement. It's a page. It's a thing. It's a picture that says X,
18 Y or Z, and we'll find a witness to catch up to it in a minute.
19 Something. And the general nature of the notice they provided to
20 this Court, provided to defense, provided to my client; PFC Manning
21 is not sufficient. And we would ask that you foreclose this
22 opportunity today and wait no longer.

23 TC[MAJ FEIN]: Ma'am, if I may, only 'cause Captain Overgaard

1 wasn't at the 802 conference when the parties discussed this with the
2 Court, and to clear up the record here is that when the -- when the
3 parties met with the Court to discuss the case calendar for the
4 rebuttal, the government made a point that -- and this was Wednesday
5 after the close of the session, that because we were responding to --
6 the United States was responding to the R.C.M. 917 motion, that we
7 did not have adequate time, because the government -- the defense
8 closed its case so -- so quickly to prepare for the rebuttal case and
9 litigate those motions. And all the parties agreed with -- and with
10 the Court, that although we would file by Monday morning 09, that
11 only give us one business day on Friday to identify people available
12 and where they could come from and who they were. And that we'd
13 provide as much notice as possible and then continue working on it.
14 And that's exactly what we did. This was discussed ahead of time,
15 Your Honor -- this part of it.

16 MJ: Major Fein, I understand all that. Where -- I'm having
17 problems with is you knew Professor Benkler was testifying for
18 months, why didn't -- and you made no effort to pull any of these
19 websites he's -- either cross-examine him or have somebody
20 potentially online in rebuttal? I mean, you knew what he was going
21 to testify about.

22 TC[MAJ FEIN]: Ma'am, we actually do have people on line. The
23 problem is trying to find them. We have one witness -- one person

1 identified, as of yesterday, was emailed -- he's going to be -- I
2 guess he's deployed or out of town for official business -- a U.S.
3 government employee -- gave us two other leads and two other
4 organizations that pulled the website. These can't be just any
5 individual, it has to be a specific individual who pulled the website
6 in 2009-2010 timeframe -- individuals who as part of their normal
7 course of business -- just like the internet archive, grabs
8 information and brings it down. And that's what issue is, Your
9 Honor. A U.S. government official was identified, he is no longer
10 available this week, and now we're trying to find the other
11 individuals. And he's assisting us. That was back Friday -- it was
12 actually, before Friday that we were trying to work on this to get
13 the exact identification of the individual. But we only really had
14 Friday to -- to -- do that full time. And in reference to your
15 question, Your Honor, about Professor Benkler; Professor Benkler,
16 testified he never looked at the website, and he didn't spend that
17 much time. He relied on the press articles. That was the substance
18 of his entire -- his entire testimony.

19 MJ: But that didn't preclude the government from showing them
20 to it -- having any evidence and cross-examining him on it.

21 TC[MAJ FEIN]: Your Honor, that is correct, we could have pulled
22 the website ourselves and done that. It doesn't mean it's authentic,
23 but we could have done that. So now what -- what we're asking

1 for is, in order to -- in rebuttal, is to potentially -- if we can
2 get the evidence and get the right witness by the time set by the
3 Court, is to admit the evidence, with a knowledgeable witness on what
4 it actually looked like. And that allows us to counteract the
5 testimony of Professor Benkler.

6 MJ: Yes [speaking to the defense]?

7 ADC[MAJ HURLEY]: Ma'am, may I be heard on the -- the schedule
8 -- very limited -- very limited weight. The government indicated the
9 time it needed with the Court; the Court okayed it. What we -- we
10 certainly -- and we were sitting there most assuredly. What we
11 certainly didn't consent to on any level, ma'am, whatsoever period
12 was the receipt of a rebuttal witness that was a question mark. And
13 that's what the government's done in this case. And that's where we
14 would have objection and we would ask you to stop this from going
15 forward for another moment. Thank you.

16 MJ: All right, I'm going take this one under advisement as
17 well. Next?

18 ATC[CPT OVERGAARD]: The United States also would like to recall
19 Mr. Milliman to explain what or what was not authorized on a DCGS-A
20 machines. And this would specifically go to what he may or may not
21 have told Chief Ehresman.

22 MJ: Well, you're recalling Chief Ehresman anyway, right?

23 ATC[CPT OVERGAARD]: Potentially, ma'am. We need to reach out to

1 him again based on the email that we just received.

2 MJ: Defense?

3 ADC[MAJ HURLEY]: Ma'am, it's the first position of the
4 defense that much like Special Agent Shaver, I believe, with respect
5 to the Wget information, Mr. Milliman's already testified to this --
6 that he's already covered what he understands is authorized, what he
7 understood was not authorized. On direct examination -- and I'm
8 using the official transcript, he was asked if he recalls if Wget was
9 authorized executable file? He said he didn't understand. On cross-
10 ---

11 MJ: I'm sorry, say that one more time.

12 ADC[MAJ HURLEY]: On direct examination he was asked if he --
13 if he recalls if Wget was an authorized executable file -- and that
14 question was posed by Captain Hunter Whyte -- and his answer was that
15 he does not recall that. On cross-examination, he talked with Mr.
16 Coombs during the cross-examination about the method though which he
17 would vet whether or not something was authorized or not authorized.
18 So it's the position of the defense, ma'am, this information
19 government wants to recall Mr. Milliman for has been well and truly
20 covered during its merits case.

21 MJ: When did you call Mr. Milliman?

22 ATC[CPT OVERGAARD]: Ma'am, just factually, the United States
23 would point out that none of the elicited testimony about what could

1 or not be run from a CD.

2 ADC[MAJ HURLEY]: Ma'am, answer to the Court's question, the
3 unofficial draft that we have is 12 June 2013.

4 MJ: 12 June. Thank you.

5 [Pause]

6 MJ: So, Captain Overgaard, if I'm understanding, you're calling
7 him, and you're going to limit is testimony solely to CDs?

8 ATC[CPT OVERGAARD]: Yes, Ma'am. Whether or not you can run
9 otherwise unauthorized programs and executable files from a CD, and
10 whether he would have told Chief Ehresman that.

11 MJ: I don't believe Mr. Milliman testified about CDs.

12 ADC[MAJ HURLEY]: Ma'am, I don't recall, but just a point of
13 clarification, it -- would you like -- the response of the defense to
14 that query is we don't recall what, if anything, Mr. Milliman said
15 about that. I'd have to take a look at his testimony, ma'am. The
16 clarification we would like is -- is it that the running from a CD
17 wasn't allowed? Is that the point of evidence that they -- the
18 government wants to get? Or that it wasn't authorized? Not allowed
19 or physically impossible; and those are -- those are the two aspects
20 of the field that we're trying to figure out.

21 MJ: Captain Overgaard?

22 ATC[CPT OVERGAARD]: I would ask him about both, ma'am.

23 MJ: Okay.

1 ADC[MAJ HURLEY]: Yes, ma'am.

2 MJ: All right. I'll let you recall him to do that, yes.

3 ADC[MAJ HURLEY]: I was going to restate our position, but I
4 think the Court is well aware of our position.

5 MJ: Yep. If you're limiting it to that; I don't want a
6 recitation of his direct testimony again.

7 ATC[CPT OVERGAARD]: Yes, ma'am. And the United States would
8 also request that the Court take judicial notice of the entire "Good
9 Soldiers" by David Finkel book.

10 MJ: Any objection?

11 ADC[MAJ HURLEY]: Yes, ma'am, we would just -- we don't --
12 we're at a loss to understand its relevance -- the entirety of the
13 book. Certainly the excerpt that we submitted, and the Court's taken
14 judicial notice of -- it's just the entirety of the book that we fail
15 to understand what, if any, relevance it has to this particular
16 matter.

17 MJ: What is the relevance?

18 ATC[CPT OVERGAARD]: Ma'am, there's other information in the book
19 that would have informed the accused's knowledge of what should or
20 should not have been released. In particular, Mr. Finkel included a
21 note on sources and methods and their deliberate exclusion from the
22 book. And also the book would reveal that not the entire Apache
23 video transcript was released in the book.

1 ADC[MAJ HURLEY]: Ma'am, we would next ask what portion of the
2 book and what evidence that the government has that PFC Manning has
3 read those passages.

4 ATC[CPT OVERGAARD]: It's evidenced in the Lamo chats that the
5 accused referred to the Finkel book. If defense doesn't plan on
6 arguing that the accused read and understand the book, then that
7 would change the government's argument.

8 MJ: Now I am completely confused. What -- what -- what do you
9 mean?

10 ATC[CPT OVERGAARD]: Part of -- part of the reason the government
11 was making this argument in the first place is because the government
12 assumed that the defense -- the relevance of the book and the point
13 defense was trying to make in taking judicial notice was that the
14 accused was on notice of some of the alleged information in the
15 Apache being released. Now if that's not defense's contention, then
16 government may -- may have a different position.

17 ADC[MAJ HURLEY]: Ma'am, we offered that evidence -- the
18 transcript -- the portion of the book that's transcribed to undermine
19 the idea that this is information that could be damaging -- not
20 that's closely held or could aid a foreign nation. It was for that
21 purpose this is transcript, it's been out in a book. It's been out
22 in a book since published in 2009 as I recall -- that's when I first
23 read it. So it's that information and that point of law that we --

1 that we sought the Court to take judicial notice of this matter. And
2 you have taken judicial notice of it. So that's the point. It's not
3 what, if any, notice it provided the accused. It's what was out
4 there in the world about this engagement or not out there. And it's
5 the position of defense -- I believe we've well and truly established
6 that this transcript of these radio calls was out there and was the
7 subject of a good deal of public knowledge.

8 MJ: So the defense is not offering this for the element that
9 PFC Manning had reason to believe that the information could -- I
10 need to get the exact words, but the ----

11 ADC[MAJ HURLEY]: Ma'am, I'll let Mr. Coombs -- if the Court
12 has additional questions.

13 CDC[MR. COOMBS]: On that they -- he was in the Lamo chat -- I
14 guess the defense's position on this is where PFC Manning was and at
15 the time of the publication of the book, the Lamo chat talks about
16 the fact he saw online that Finkel talked about this. And even
17 though this is not, hasn't been introduced into evidence, the Court
18 can, I guess, consider just about anything on making this ruling --
19 the excerpt of the Finkel book that we referenced was available
20 online. That was when you went to Amazon in order to look at it,
21 that was the excerpt that they -- they released. There's no evidence
22 that my client read the book. So my client was aware of the Finkel
23 book. He was aware of the excerpt and the fact that it quoted it

1 verbatim because it's in the Lamo chats. So we would offer it not
2 only for the fact to show it is not closely held, but reason to
3 believe on the part of my client. What's missing here, I guess, is
4 the connection -- because I haven't read the whole book -- but if
5 there's other things in the book, there's been no evidence that PFC
6 Manning read those other things. And, in fact, when you look at the
7 Lamo chat, it's clear that he saw it online. And the book has never
8 been released online; just that excerpt. So our position would be
9 that the -- the judicial notice request ----

10 MJ: Well, that's not before me in evidence that the book isn't
11 online, and released online, and none of the rest of the book is
12 online.

13 CDC[MR. COOMBS]: I grant you that, Your Honor. The defense's
14 position though would be the judicial notice -- judicial notice
15 request -- the relevance of that would only be if they could show
16 that PFC Manning read those other excerpts. Because apparently what
17 Captain Overgaard just stated there is some other provisions,
18 footnotes, or whatnot, that may give you some notice and that goes
19 towards apparently their 104 offense. But, again, that would only be
20 relevant if you show that PFC Manning read that. So what the Court
21 would have the benefit of, I guess, is the Finkel reference in the
22 Lamo chats, and whether or not you believe that would mean that PFC
23 Manning must have read the book and, therefore, it's relevant,

1 judicial notice should be granted, or no evidence that he read the
2 entire book and, therefore, it should not be granted.

3 MJ: Okay. Let me ask one more question. The portion of the
4 book -- you're offering this for two reasons; one is, the closely
5 held, and the other one is the reason to believe. Now with respect
6 to the closely held; there's two pieces of evidence you're looking
7 for with judicial notice for the book; one is the -- his footnotes or
8 whatever on sources and methods, and the other one is that -- not the
9 entire transcript was published. What's -- what's the second one?

10 ATC[CPT OVERGAARD]: Yes, Ma'am. One is the -- a specific page
11 called note on sources and methods. And the for the book in the
12 entirety it's just to show the Court that the entire the book was not
13 closely held -- the -- the video was not closely held. Hard time,
14 sorry, ma'am. Not all of the information in the video was revealed
15 in the book.

16 MJ: And there's something else in the book that says that?

17 ATC[CPT OVERGAARD]: No, ma'am.

18 MJ: That's what I thought I heard you say in the beginning.

19 ATC[CPT OVERGAARD]: No, ma'am.

20 MJ: Maybe I misunderstood what you said.

21 ATC[CPT OVERGAARD]: No.

22 CDC[MR. COOMBS]: Ma'am, I guess on the closely held part, you
23 know, we -- the defense will stipulate that the entire video is not

1 verbatim in Mr. Finkel's book. That kind of loses the point though.
2 The point is that Mr. Finkel had a copy of the video. So then, the
3 video wasn't closely held in order to quote the video. So the
4 passages in the book that do quote the video, quote it verbatim. And
5 it certainly is not a complete verbatim transcript. That's why you
6 have what the defense offered, a verbatim transcript of PE 15.
7 That's certainly not in the book. So for that fact, the defense
8 would stipulate that a verbatim transcript of PE 15 is not contained
9 in the book as far as the higher transcript. But what is in the book
10 is verbatim from the video.

11 MJ: Okay. But I remember back from day one -- this is why we
12 watched the whole video.

13 ATC[CPT OVERGAARD]: Well, there's -- there's actually no
14 evidence in the book that he watched the video -- that Mr. Finkel
15 watched the video.

16 MJ: Is there any other evidence besides -- besides the passages
17 passed by the -- the passages the defense asked me to take judicial
18 notice that address the video in any way; explain why -- that he had
19 the video, explain a footnote, why it's there?

20 TC[MAJ FEIN]: Your Honor, once again, I'll take over from this
21 point because I read the book. Your Honor, there's no evidence in
22 the book on whether Mr. Finkel ever saw a video. That's conjecture
23 on the defense's part. Now we have agreed that there's a stipulated

1 transcript of the video. And the defense is going to argue, we
2 assume in closing, that as the Trier of Fact, you should read the
3 two, read the book excerpts and read this. But there's no evidence
4 that he saw the video. There could have been other methods of Mr.
5 Finkel receiving that information. The government's not arguing the
6 part that we stipulated to, which is that is a transcript of what was
7 made of the video.

8 MJ: All right. So what I have is circumstantial evidence that
9 Mr. Finkel saw the video or at least ----

10 TC[MAJ FEIN]: For argument, yes, ma'am.

11 MJ: Yes. So I guess we are really looking at this is what --
12 so we're really down now -- there's nothing else in the book that
13 addresses the video, and the defense has stipulated to that, we're
14 done to the sources and methods.

15 TC[MAJ FEIN]: Yes, ma'am. And the sources and methods chapter
16 -- and -- well, it's one page in the book, explains exactly his
17 methodology of -- of how he wrote the book and the protections that
18 he gave and where the sources of information came. Now it does talk
19 about firsthand accounts and it talks about a bunch of different
20 sources of how he compiled his book. So if the defense is able to
21 argue that -- that because -- make this argument that -- that it's an
22 inference that he saw the video, then this section should be --
23 should be relevant to possibly counteract that. And then for the

1 second part, if defense is able to make the argument during argument
2 that PFC Manning read any portion of the book, then the entire book,
3 or at least portions that we select by Thursday, should be equally
4 admissible. Because there is no evidence, even in the chat logs, as
5 I'm looking at them now, that there was a certain portion on line.
6 That again is not evidence before the court.

7 MJ: I got that.

8 CDC[MR. COOMBS]: The last point; the evidence that there's
9 certain portion was available at least is coming from the Lamo chats
10 where he says Finkel quoted the video verbatim -- he had copy of the
11 video. The government's saying that there's no evidence that Mr.
12 Finkel had a copy of the video. Then essentially what they are
13 saying is, well, he could have got an audio version. So really the
14 only way -- I mean I think we all can agree that Mr. Finkel cannot
15 predict without seeing the video or at least hearing the audio of the
16 video what the Apache helicopter crew would have said. And clearly
17 he quotes them verbatim. So he's either seen the video or he's seen
18 -- he's heard the audio recording. I'm unaware of just a simple
19 audio recording, but I'm sure if the government was aware of that,
20 they would have offered that in evidence to rebut any idea that the
21 video was not released.

22 MJ: All right. Well, this -- this is all for closing argument,
23 but right now the -- let me look at Lamo chats. I'll take this under

1 advisement once again. I would like to take a look at the Lamo chats
2 because it seems to me that if the -- there's nothing in there about
3 getting something from an internet, then there is circumstantial
4 evidence that if you read part of a book, you read the whole book.
5 You don't have to buy that, but it's circumstantial evidence. And
6 the sources and methods, too, if it's in one page of a book that
7 somebody might have read, it would make a difference if the book five
8 pages or 500 pages as to whether one would see or remember that. So
9 I'll just take that under advisement and see what the Lamo chats say.
10 But -- I mean, Mr. Coombs, if you have any evidence that there was
11 not some online version or that -- other than the book, I'm willing
12 to get it. But right now, I just don't have any evidence of it.

13 CDC[MR. COOMBS]: Yes, Your Honor. So what we could do with
14 regards to this judicial notice issue, we could pull the fact that on
15 Amazon.com that was the version -- that portion of that book --
16 that's the portion the book that they show on Amazon.com. Even
17 today, that's the portion of the book that they show. So when you go
18 to Amazon.com to purchase the book, or even Google books, to purchase
19 it, that's the excerpt they allow you to read to determine don't -- I
20 want to read the rest of this book.

21 MJ: If you want to present that as evidence, I'm happy to look
22 at it.

23 CDC[MR. COOMBS]: Yes, Your Honor.

1 MJ: And this actual judicial notice; is this something that I
2 need to decide -- I mean, if I make the rest of this decision, we
3 have to decide how we are going to proceed on Thursday. Is this
4 judicial notice question part of that? I mean, that's really going
5 towards -- is this part of government's rebuttal case or is this
6 something that can be decided prior to closing arguments?

7 TC[MAJ FEIN]: Ma'am, it can be done any time except for if the
8 defense does intend to proffer evidence such as what is on Amazon or
9 Google, then we would like a chance to at least rebut it.

10 MJ: That's what I mean. So I think I'm going to sever this
11 piece of it and make a decision -- not today.

12 TC[MAJ FEIN]: Yes, ma'am.

13 MJ: How soon can you get whatever you're going to give to the
14 government so they can take a look at it?

15 CDC[MR. COOMBS]: Well, we can pull a portion to show the
16 government. If there's a authentication issue, we would need to set
17 up a person with knowledge, probably we would use Trent Struttman,
18 our forensic expert, to say, hey, I went there today, I pulled it.
19 The question would be then, obviously what existed back at the time
20 that PFC Manning might have looked at it? For that, if this becomes
21 a huge issue, we could employ the services of Chris Butler again to
22 see if perhaps Stanford or some other organization employs him to
23 preserve Amazon.com.

1 MJ: Well, again, this -- at this point we are operating under
2 M.R.E. 104(a). So I can consider hearsay and statements and all of
3 that. So the standard for internet archived material would not be
4 the same as it would be if it was introduced at trial.

5 CDC[MR. COOMBS]: So I could pull that excerpt and provide
6 that to the government. And then provide that to the Court as well
7 by email, hopefully tomorrow. Which brings up a point actually; with
8 regards to the 1030 cases -- parts -- yeah, the 1030 case, we request
9 that we actually get till noon tomorrow to provide those cases to
10 you.

11 MJ: Okay. Now if I don't get those -- if I get those cases by
12 noon, is the government going to need any additional time other than
13 ----

14 ATC[CPT MORROW]: Yes, Ma'am. Which cases are we -- just the
15 641 or 1030.

16 MJ: The 641 he meant.

17 CDC[MR. COOMBS]: 641 is what I meant.

18 TC[MAJ FEIN]: Yes, ma'am, we would ask by noon the next day in
19 order to ----

20 MJ: That's fine.

21 TC[MAJ FEIN]: And, ma'am, I -- we'll have this marked right
22 now, but here's a today printouts for the motions practice purposes,
23 Amazon.com, Good Soldiers, and it actually has a note of sources and

1 methods -- it comes up web page from Amazon. So we'll have it marked
2 versus the Apache video portion.

3 MJ: So is that with the Apache video portion; is that what
4 you're talking about?

5 TC[MAJ FEIN]: No, ma'am. It's just actually what comes up, it
6 says a note on sources and methods. It's literally the page we're
7 talking about that we want judicially noted. This is what comes up
8 on Amazon today.

9 MJ: Well, why don't you -- when we take a recess ----

10 TC[MAJ FEIN]: Yes, ma'am.

11 MJ: ---- you all can get together, and if the defense thinks
12 something else pulls up, they can show you how ----

13 TC[MAJ FEIN]: Yes, ma'am.

14 MJ: ---- and vice versa, and we can go from there. So I'm
15 thinking why don't we revisit this on Thursday morning. Does that
16 work?

17 CDC[MR. COOMBS]: Yes, Your Honor.

18 TC[MAJ FEIN]: Yes, ma'am.

19 MJ: And exchange whatever issues you can exchange. And we'll -
20 - we'll take a look at it there. And I'll take a look at the Lamo
21 chat in the meantime. Now is it the parties' position that the only
22 evidence I have before me of what, if anything, PFC Manning read is
23 what's in the Lamo chats?

1 CDC[MR. COOMBS]: That is correct, Your Honor.

2 TC[MAJ FEIN]: Yes, ma'am.

3 MJ: That's it, right? So I've got two left to decide today,
4 which I'm going to need a recess on, and the *United States v. Murphy*,
5 I guess, is the case I'm going to be looking at.

6 CDC[MR. COOMBS]: Yes, ma'am.

7 MJ: And the two outstanding ones are recalling Special Agent
8 Shaver and the additional forensic invest -- investigator. All
9 right, is there anything else we need to address at this point?

10 ATC[CPT OVERGAARD]: Just to clarify, ma'am, it's just call --
11 recalling Special Agent Shaver to discuss the emails the accused sent
12 members of the media and the WikiLeaks Tweets that were found on his
13 personal Mac.

14 [Pause]

15 MJ: All right. Why don't we take a recess then and reconvene
16 at 7:30 or 1930. Is that acceptable to everybody?

17 CDC[MR. COOMBS]: Yes, Your Honor.

18 TC[MAJ FEIN]: Yes, ma'am.

19 MJ: Court is in recess.

20 **[The court-martial recessed at 1859, 15 July 2013.]**

21 **[The court-martial was called to order at 1936, 15 July 2013.]**

22 MJ: The Court is called to order. Let the record reflect all
23 parties present when the court recessed are again present in court.

1 All right, we have -- before we get to the last two issues
2 in the government rebuttal, can either side point me out in the Lamo
3 chats exactly where the Finkel book is referenced?

4 TC[MAJ FEIN]: Yes, Ma'am. It's referenced twice. Ma'am, it's
5 first -- it's Page -- it's referenced twice. It's referenced on Page
6 27, at 3:11:54 p.m., and it's referenced on Page 34, at the very
7 bottom, at 2:26:10 a.m. -- 2:26:10 a.m.

8 MJ: And, I'm sorry, that's page?

9 TC[MAJ FEIN]: That was Page 34, Your Honor.

10 MJ: And 2:26 p.m., you said?

11 TC[MAJ FEIN]: Yes, ma'am, 2:26 -- no, 2:26 a.m. at the bottom
12 of Page 34.

13 MJ: Okay. Okay. All right. Thank you. All right, I've taken
14 a look at *United States v. Murphy*, which as I read that case,
15 basically that's really relevant to the second piece of rebuttal
16 evidence, but basically when there's late notice, late disclosure,
17 late discovery of the rebuttal evidence, what remedies the Judge has.
18 And I've got everything from granting a continuance basically to
19 excluding the evidence.

20 With respect to the government's intent to recall Special
21 Agent Shaver to discuss emails PFC Manning sent to members of the
22 media as well as WikiLeaks Tweets that were found in his personal
23 Macintosh computer to rebut evidence offered by the defense that

1 WikiLeaks operated as a journalistic organization and was considered
2 a legitimate journalistic organization at the time, what's really
3 relevant here is not whether WikiLeaks was a legitimate journalistic
4 organization, it's whether PFC Manning thought WikiLeaks was a
5 legitimate journalistic organization. So to the extent that those
6 are relevant to rebut the testimony of Professor Benkler, the Court
7 will allow it.

8 Now with respect to the second -- the additional forensic
9 investigator witness to discuss the WikiLeaks website, I'm not going
10 to allow the government to do that. You had months to figure this
11 out. So -- and we're at the last minute here -- the defense,
12 otherwise, I would certainly give the defense a continuance to be
13 able to address this information. So at this point I think the
14 appropriate remedy, based on the amount of time the government had to
15 figure this out, is to not allow the evidence. I'm not going to.
16 Anything else we need to address with respect to rebuttal?

17 TC[MAJ FEIN]: No, ma'am.

18 CDC[MR. COOMBS]: No, ma'am.

19 MJ: Are there any other substantive issues we need to address
20 today? I understand we need to have the 802 conference to talk about
21 notice for defense surrebuttal case, how we're going to proceed. But
22 we are going to proceed in some fashion in the next session on
23 Thursday morning, is that correct?

1 TC[MAJ FEIN]: Yes, Ma'am.

2 CDC[MR. COOMBS]: Yes, Your Honor.

3 MJ: Is that for purposes of the public coming back on the
4 record, does either side see any need to do that?

5 CDC[MR. COOMBS]: No, Your Honor.

6 TC[MAJ FEIN]: No, Ma'am, not until 0930 on Thursday morning.

7 MJ: All right, so for the gallery and members of the public,
8 the next session we will be having in this case here in court will be
9 at 0930 on Thursday. We will at least be addressing R.C.M. 917
10 motions and presentation of the government's rebuttal case, and the
11 judicial notice for the entire Finkel book. And then how we proceed
12 from there is what the parties and I are going to discuss after we
13 recess today. Is there anything else we need to address?

14 CDC[MR. COOMBS]: No, Your Honor.

15 TC[MAJ FEIN]: No, ma'am.

16 MJ: Court is in recess.

17 **[The court-martial recessed at 1939, 15 July 2013.]**

18 **[END OF PAGE]**

1 [The court-martial was called to order at 0940, 18 July 2013.]

2 MJ: Court is called to order. Major Fein, please account for
3 the parties.

4 TC[MAJ FEIN]: Ma'am, all parties present when the Court last
5 recessed are again present with the following exception: Captain
6 Overgaard is absent; Captain von Elten is present. Also, ma'am, as
7 of 9:15 this morning, there are 27 members of the media in the Media
8 Operations center, one stenographer, no media in the courtroom, 25
9 spectators in the courtroom, and 3 spectators in the overflow
10 trailer.

11 MJ: All right. Thank you. Would the parties like to identify
12 any new exhibits that have been added to the record?

13 TC[MAJ FEIN]: Yes, ma'am. Ma'am, on 17 July 2013, the United
14 States filed its brief on 18 U.S.C. 641 -- its targeted brief for the
15 R.C.M. 917 litigation. And that's been marked as Appellate Exhibit
16 606. Also, what has been marked as Appellate Exhibit 607 is a
17 defense submission of one internet printout from Amazon.com related
18 to the David Finkel book. And what's been marked as Appellate
19 Exhibit 608 is an email from Mr. Coombs, subjects additional case for
20 defense filing in reference to the R.C.M. 917 motion for the 18
21 U.S.C. 641 offense.

22 MJ: All right. Thank you. The Court is prepared to rule on
23 two of the defense motions for findings of not guilty under R.C.M.

1 917; that would be for the offenses of the Specification of Charge I,
2 which would be Article 104, and Specification 13 of Charge II, which
3 would be fraud and related activity with computers in violation of 18
4 United States Code, Section 1030(a)(1) and Article 134.

5 [Reading from Appellate Exhibit 609] On 4 July 2013, the
6 defense filed four Motions for Findings of Not Guilty in accordance
7 with R.C.M 917 for the following offenses alleging that the
8 government has failed to present evidence to prove one or more
9 elements of those offenses Appellate Exhibits 593 through 596).

10 (1) Aiding the Enemy, in violation of Article 104, UCMJ,
11 the Specification of Charge I. The defense challenges one element
12 and specifically asserts the government has not provided evidence
13 that proves the accused knowingly gave intelligence information to
14 certain persons, namely: al-Qaeda, and al-Qaeda in the Arabian
15 Peninsula. The Court's instructions define "knowingly."
16 "'Knowingly' requires actual knowledge by the accused that by giving
17 the intelligence to the third party or intermediary or in some other
18 indirect way, that he was actually giving intelligence to the enemy
19 through this indirect means. This offense requires that the accused
20 had a general evil intent in that the accused had to know he was
21 dealing, directly or indirectly, with an enemy of the United States.
22 'Knowingly' means to act voluntarily and deliberately. A person
23 cannot violate Article 104 by committing an act inadvertently,

1 accidentally, or negligently that has the effect of aiding the
2 enemy."

3 (2) Fraud and Related Activity with Computers, in violation
4 of 18 U.S.C. section 1030(a)(1) and Article 134, UCMJ, Specification
5 13 of Charge II. The defense asserts the government has not provided
6 evidence that the accused exceeded authorized access on a Secret
7 Internet Protocol Router Network (SIPR) computer;

8 (3) Stealing, Purloining, or Knowingly Converting Records
9 Belonging to the United States, in violation of 18 U.S.C. section 641
10 and Article 134, UCMJ, Specifications 4, 6, 8, 12, and 16 of Charge
11 II;

12 (4) Particularized motion with respect to Specification 16
13 of Charge II. On 11 July 2013, the government filed three briefs in
14 opposition, Appellate Exhibits 599 through 601. On 12 July 2013, the
15 defense filed a reply brief to the government's brief in response to
16 the defense Motion for a Finding of Not Guilty on the 18 U.S.C. §641
17 offenses, Appellate Exhibit 603. On 16 July 2013, the defense
18 supplemented their brief on the 18 U.S.C. section 641 offenses with
19 an email filing, Appellate Exhibit 608. On 17 July 2013, the
20 government filed a supplemental response in opposition to the email
21 filing, Appellate Exhibit 606. On 15 July 2013, the Court heard oral
22 argument on the R.C.M. 917 Motions for the specification of Charge I,
23 Aiding the Enemy, in violation of Article 104, UCMJ, and

1 Specification 13 of Charge II; Fraud and Related Activities with
2 Computers, in violation of 18 U.S.C. section 1030(a)(1) and Article
3 134, UCMJ On 18 July 2013, the parties will present oral argument
4 regarding the R.C.M. 917 Motions for Specifications 4, 6, 8, 12, and
5 16 of Charge II; Stealing, Purloining, or Knowingly Converting
6 Records Belonging to the United States, in violation of 18 U.S.C.
7 section 641 and Article 134, UCMJ

8 This ruling sets forth the legal standard used by the Court
9 in determining motions for a finding of not guilty under R.C.M. 917
10 and findings of fact and conclusions of law regarding the R.C.M. 917
11 motions for Article 104, Aiding the Enemy and 18 U.S.C. section
12 1030(a)(1), Article 134.

13 After hearing oral argument on the motions, the Court will
14 issue a supplemental ruling for the 18 U.S. C. section 641/Article
15 134 offenses.

16 The Law:

17 1. PFC Manning has elected trial by military judge alone,
18 thus, the Court acts in two capacities. As the fact-finder, the
19 court must determine whether the government has proven each and every
20 element of each offense charged beyond a reasonable doubt. In
21 considering this Motion for a finding of not guilty by the defense,
22 the Court acts in its interlocutory capacity and decides the motion
23 under the lesser standard required in R.C.M. 917.

1 2. R.C.M. 917 Standard: A motion for a finding of not
2 guilty shall be granted only in the absence of some evidence which,
3 together with all reasonable inferences and applicable presumptions,
4 could reasonably tend to establish every essential element of an
5 offense charged. The evidence shall be viewed in the light most
6 favorable to the prosecution, without an evaluation of the
7 credibility of witnesses. R.C.M. 917(d).

8 3. Should the Court grant a finding of not guilty to an
9 element of the greater offense for an offense to which PFC Manning
10 has pled guilty to a lesser included offense, the government would be
11 precluded from proceeding on the greater offense. R.C.M. 917(e).

12 R.C.M. 917, Article 104, UCMJ, Aiding the Enemy:

13 Findings of Fact:

14 1. The Court has examined the prosecution exhibits, Defense
15 Exhibit Juliet, and testimony of the witnesses set forth in the
16 witnesses evidence portion of the government brief, Appellate Exhibit
17 600. This provides some evidence that between on or about 1 November
18 2009 and 7 May 2010 the accused:

19 (1) Was an enlisted Soldier who was a trained all-source
20 intelligence analyst, 35 Foxtrot. The accused trained and passed 35
21 Foxtrot Advanced Individual Training (AIT). This training identified
22 al-Qaeda as a terrorist group. It also included a lesson on
23 terrorist use of the internet and lessons on information security

1 (INFOSEC) to include the classification process, why information is
2 classified, restrictions on access to classified information, storage
3 and safekeeping of classified information to include individual
4 responsibility to safeguard classified information and to ensure that
5 unauthorized persons do not gain access to classified information.
6 The training further instructed 35 Foxtrot Soldiers that the enemy
7 will attempt to discover how and when the U.S. is conducting
8 operations. As such, critical information (anything that helps the
9 enemy obtain an advantage over the U.S.) including tactics,
10 techniques and procedures (TTPs), unit capabilities and intent, and
11 personal/family information must be protected. The training
12 completed by the accused warned that operational activities should
13 not be discussed on the internet or on email, and Soldiers should
14 always assume the adversary is reading posted material.

15 (2) Prepared a slide show, dated 13 June 2008, entitled
16 "Operations Security (OPSEC)" that defined critical information,
17 identified adversaries, listed common OPSEC leaks, and concluded with
18 the need to avoid public disclosure of critical information to
19 include posting information on the internet.

20 (3) Signed two non-disclosure agreements, dated 7 April
21 2008 and 17 September 2008, respectively, where he acknowledged that
22 he received and understood a security indoctrination concerning the
23 nature and protection of classified information including the

1 procedures to be followed in ascertaining whether persons to whom the
2 accused contemplates disclosing classified information have been
3 approved for access to it and that the accused has been advised that
4 the unauthorized disclosure of classified information could cause
5 damage or irreparable injury to the U.S. or could be used to the
6 advantage of a foreign nation.

7 (4) Maintained a variety of intelligence publications on
8 his external hard drive. Portions of the publications address use of
9 the internet by terrorist organizations and opposing forces.

10 (5) Deployed to Forward Operating Base (FOB) Hammer, Iraq
11 on or about October 2009 and remained deployed there past May 2010.
12 He had access to the classified information on the Secret Internet
13 Protocol Router (SIPR) network on the defense Common Ground System-
14 Army (DCGS-A) computers in the 2nd Brigade SCIF. The accused was
15 working as an all-source intelligence analyst, using the SIGACTS on
16 the CIDNE-I database to develop intelligence products that involved
17 pattern analysis. The accused downloaded, indexed, and plotted
18 CIDNE-I SIGACTS on maps based on locations and enemy threats. The
19 accused was aware that the enemy also engaged in similar pattern
20 analysis about U.S. TTPs and movements. The accused sent to
21 WikiLeaks the same CIDNE-I database and SIGACTs he used to develop
22 pattern analysis with the intent that it be disclosed to the public.
23 (6) Accessed the ACIC report published on 18 March 2008

1 entitled "WikiLeaks.org - An Online Reference to Foreign Intelligence
2 Services, Insurgents, or Terrorist Groups?" on 1 December 2009, 29
3 December 2009, 1 March 2010 and 7 March 2010. The ACIC report was a
4 counterintelligence analysis report analyzing the threat posed by
5 WikiLeaks.org following the release of 2000 pages of U.S. Army Tables
6 of Equipment in Iraq and Afghanistan from April 2007 and release of
7 other classified U.S. information. The report listed as an
8 intelligence gap "Will the WikiLeaks.org Web site be used by FISS,
9 foreign military services, foreign insurgents, or terrorist groups to
10 collect sensitive or classified U.S. Army information posted to the
11 WikiLeaks.org Web site?". The report also listed a conclusion that
12 "It must be presumed that foreign adversaries will review and assess
13 any DoD sensitive or classified information posted to the
14 WikiLeaks.org website. Websites similar to WikiLeaks.org will
15 continue to proliferate and will continue to represent a potential
16 force protection, counterintelligence, OPSEC, and INFOSEC threat to
17 the U.S. Army for the foreseeable future." The accused sent the ACIC
18 report to WikiLeaks between on or about 15 February 2010 and 15 March
19 2010 with the intent that it be disclosed to the public.

20 (7) On 14 February 2010 searched for IRR 5 391 0014 08,
21 dated 23 March 2008, entitled "Internet Web Postings of Classified
22 and for Official Use Only Documents". The IRR discussed WikiLeaks as
23 a publicly accessible Internet website where leaked information,

1 including classified information, can be published to the public
2 anonymously. The report described the threat to the Marine Corps of
3 publication of Marine Corps sensitive or classified information.
4 On 15 February 2010, the accused moved the IRR to his personal
5 computer.

6 (8) On 14 February 2010, searched for a report dated 7
7 January 2010 entitled "MARFOREUR TRIP REPORT (MTR) discussing Marine
8 Corps monitoring of Chaos Communication Congress 26C3 Here Be Dragons
9 Conference held 26 to 30 December 2009." The report discussed the
10 conference discussion on WikiLeaks as a publicly accessible Internet
11 website where leaked information, including classified information,
12 can be published to the public anonymously. On 15 February 2010, the
13 accused moved the MTR to his personal computer.

14 (9) Made statements in his 5 through 18 March 2010, chats
15 with Press Association, Julian Assange, indicating his understanding
16 that WikiLeaks was "like an intelligence agency minus the anonymous
17 sources" and that WikiLeaks was seeking to publish Government
18 controlled information sent to them by the accused and other donors.

19 (10) Made statements in his May 2010, chats with Adrian
20 Lamo admitting that he gave WikiLeaks the following classified
21 information from the SIPRNET: a database of half a million events
22 during the Iraq war, from 2004 to 2009, with reports, date time
23 groups, lat-lon locations, casualty figures, 260,000 Department of

1 State cables from embassies and consulates all over the world,
2 classified cable from U.S. embassy Reykyavik on Icesave, dated 13
3 January 2010, the Gharani Airstrike video from CENTCOM.smil.mil; the
4 Apache video, and the JTF-GTMO papers. The accused also made
5 statements that the 260,000 classified cables from the Net-Centric
6 Diplomacy database that he sent to WikiLeaks would be released to the
7 public in searchable format.

8 Conclusion of Law:

9 The accused's training and experience as an all-source
10 intelligence analyst, his preparation of intelligence products while
11 deployed in Iraq, a combat zone, using the CIDNE-I database while
12 contemporaneously sending the entire database to WikiLeaks for public
13 disclosure and worldwide publication, the volume of classified
14 information from the Department of Defense and the Department of
15 State that the accused admitted to disclosing to WikiLeaks, and the
16 accused's search for and downloading of counterintelligence documents
17 reporting the threat posed by WikiLeaks, considered together, provide
18 some evidence from which, together with all reasonable inferences and
19 applicable assumptions, viewed in the light most favorable to the
20 prosecution, without an evaluation of the credibility of witnesses,
21 could reasonably tend to establish that the accused actually knew he
22 was dealing with the enemy and actually knew that by sending such
23 information to WikiLeaks with the intent that it be broadcast to the

1 public, he was knowingly providing intelligence to the enemy. The
2 "intelligence gap" evidence in the ACIC report as well as laudable
3 motive evidence by the accused goes to the weight of the evidence, a
4 decision properly determined by the fact-finder.

5 R.C.M. 917, 18 United States Code, section 1030(a)(1),
6 Fraud and Related Activity with Computers.

7 Findings of Fact:

8 1. The government's theory for Specification 13 of Charge
9 II is that the accused "exceeded authorized access" by accessing and
10 downloading classified information using Wget, an unauthorized
11 software, on Army computers and on the DCGS-A computers.

12 2. 18 United States Code, section 1030(e)(6), defines the
13 phrase "exceeds authorized access" as "to access a computer with
14 authorization and to use such access to obtain or alter information
15 in the computer that the accuser is not entitled to so obtain or
16 alter." There is a split in the federal circuits regarding whether
17 this definition is an access only restriction or whether a
18 restriction on use of the information accessed can violate the
19 statute as well. See generally Federal Computer Fraud and Abuse Act:
20 Employee Hacking Legal in California and Virginia, but Illegal in
21 Miami, Dallas, Chicago, and Boston, 87-JAN Florida B.J. 36, January
22 2013.

23 3. This Court has issued two previous rulings, dated 8

1 June 2012, Appellate Exhibit 139, and 18 July 2012, Appellate Exhibit
2 218, in response to defense motions to dismiss Specifications 13 and
3 14 of Charge II. In those rulings, the Court found ambiguity in the
4 statute, applied the rule of lenity, and ruled that the Court would
5 instruct in accordance with the narrow interpretation that "exceeds
6 authorized access" is limited to violations of restrictions on access
7 to information and not restrictions on the use of information. The
8 Court specifically ruled "Restrictions on access to classified
9 information are not limited to code based or technical restrictions
10 on access. Restrictions on access to classified information can come
11 from a variety of sources, to include regulations, user agreements,
12 and command policies. Restrictions on access can include manner of
13 access. User agreements can also contain restrictions on access as
14 well as restrictions on use. The two are not mutually exclusive.
15 The Court does not find this issue capable of resolution prior to the
16 presentation of evidence. These issues are properly decided after
17 the formal presentation of the evidence as a motion for a finding of
18 not guilty or a motion for finding that the evidence is not legally
19 sufficient."

20 4. The accused pled guilty to the lesser included offenses
21 of Specifications 13 and 14 of Charge II. The government advised the
22 Court it is not going forward with the greater offense for
23 Specification 14 of Charge II.

1 5. In line with the Court's 18 July 2012 order, the
2 defense challenges the government theory on legal grounds and moves
3 for a finding of not guilty. Specifically, the defense argues that
4 there were no restrictions on the accused's access to the Department
5 of State Net-Centric Diplomacy database or his ability to download
6 the records in the NCD imposed by either DoS or DoD. The accused
7 would have the same access to the NCD whether he used Wget to
8 download the files rapidly or whether he downloaded them slowly by
9 click and save. Thus, the defense argues, even if Wget is an
10 unauthorized program, it is not an access restriction for purposes of
11 18 United States Code, section 1030(a)(1).

12 6. The defense cites *Wentworth-Douglass Hospital and Young*
13 *& Navis Professional Association*, 2012 West Law 2522963, District
14 Court of New Hampshire (D.N.H.), a civil case under 18 United States
15 Code, 1030(a)(2)(C), where the defendants violated a hospital
16 computer use policy by connecting large removable storage devices to
17 download information. The court held that this was a use restriction
18 not an access restriction ("Of course, the distinction between an
19 employer-imposed 'use restriction' and an 'access restriction' may
20 sometimes be difficult to discern, since both emanate from policy
21 decisions made by the employer, decisions about who should have what
22 degree of access to the employer's computer and stored data and, once
23 given such access, the varying uses to which each employee may

1 legitimately put those computers and the data stored on them. But,
2 simply denominating limitations as 'access restrictions' does not
3 convert what is otherwise a use policy to an access restriction.
4 Here, the hospital's policy prohibiting employees from accessing
5 company data for the purpose of copying it to an external storage
6 device is not an 'access' restriction; it is a limitation on the use
7 to which an employee may put data that he or she is otherwise
8 authorized to access. An employee who is given access to hospital
9 data need not 'hack' the hospital's computers or circumvent
10 technological access barriers in order to impermissibly copy that
11 data onto an external storage device. The offending conduct in this
12 case is misuse of data the employee was authorized to access, not an
13 unauthorized access of protected computers and data.")

14 7. The government has presented testimony by Special Agent
15 David Shaver, Mr. Jason Milliman, Captain Thomas Cherepko, and Mr.
16 Mark Kitz that Wget is not authorized software for a DCGS-A computer
17 and, even if it was, Wget, as executable software, was required to be
18 installed by Mr. Milliman on the DCGS-A computers. The government
19 has also presented evidence that the accused downloaded Wget to his
20 user profile on the DCGS-A computer he used in the SCIF.

21 8. The defense has elicited testimony from Mr. Weaver and
22 Colonel Miller that Wget was no different than executable software
23 such as games, and, even if technically prohibited, these

1 prohibitions were not enforced by the chain of command.

2 Conclusions of Law:

3 1. The Court adheres to its rulings on interpreting
4 "exceeding authorized access" in Appellate Exhibit 139 and
5 218.

6 2. Unlike *Wentworth-Douglass Hospital*, this case involves
7 classified information belonging to the U.S. government. The accused
8 is charged under 18 United States Code, section 1030(a)(1). Although
9 the definition for "exceeds authorized access" is the same for all
10 sections of 18 United States Code, 1030, access restrictions on
11 classified information can be more stringent than for other
12 information and can include manner of access restrictions designed to
13 ensure the security and protection of the classified information and
14 to prevent the classified information from exposure to viruses,
15 Trojan horses or other malware.

16 3. Evidence that the accused used unauthorized software,
17 Wget, to access and download the classified records charged in
18 Specification 13 of Charge II provides some evidence from which,
19 together with all reasonable inferences and applicable assumptions,
20 viewed in the light most favorable to the prosecution, without an
21 evaluation of the credibility of witnesses, could reasonably tend to
22 establish that the accused "exceeded authorized access" on a SIPR
23 computer. The countervailing evidence presented by the defense goes

1 to the weight of the evidence, a decision properly determined by the
2 fact-finder.

3 Ruling: The defense motions for a finding of not guilty
4 for the Specification of Charge I and Specification 13 of Charge II
5 are denied. The Court will issue a supplemental ruling regarding the
6 defense motions for a finding of not guilty for Specifications 4, 6,
7 8, 12, and 16 of Charge II in due course. So ordered this 18th day
8 of July, 2013.

9 Have this marked as the next appellate exhibit in line.
10 [The court reporter marked the document Appellate Exhibit 609.]

11 MJ: All right. We have some issues with respect to judicial
12 notice. Government?

13 TC[MAJ FEIN]: Yes, Ma'am. In our last session the United
14 States moved as part of -- or moved for the Court to take judicial
15 notice of the entire David Finkel book under the pro -- or under a
16 theory that, if the defense is going to argue that PFC Manning read
17 any portion of the book, that the entire book should be judicially
18 noticed, and, thus, the prosecution would move to attend it. So the
19 United States has marked as Prosecution Exhibit 186 for
20 identification the entire David Finkel book.

21 MJ: And how do you intend to capture this for the record of
22 trial, if I admit it?

23 TC[MAJ FEIN]: Ma'am, the United States intends that if that

1 book is admitted, that the spine will be broken and it'll be put into
2 a normal 8 and one-half X 11 pages -- or 8 and one half X 11 size
3 pages and put into the record.

4 MJ: All right. Defense?

5 CDC[MR. COOMBS]: Yes, Your Honor. The Court has taken
6 judicial notice of the existence of the book. The defense's position
7 on this is that the government now, by asking the Court to put the
8 entire book in the record, there would be a 104(b) determination that
9 the Court would have to make. And that would be, first, on
10 relevance; is there evidence to show that PFC Manning read the book.
11 The defense's position on this is that the book came out in September
12 of 2009; PFC Manning deployed a month later than that; and when you
13 look at the PE 30, the Lamo chats, it's clear that PFC Manning is
14 referencing the Washington Post and David Finkel. And the defense's
15 position is that he learned of the excerpts from the video and
16 Finkel's book from the internet, not from David Finkel's actual book.
17 For that, we've asked the Court to take judicial notice of Defense
18 Exhibit -- I believe it's Hotel Hotel, which is an excerpt -- or
19 which -- excuse me, which is Washington Post article, dated 15
20 September 2009. And in that article it quotes an excerpt from the
21 video verbatim. And so the defense's position is that is where PFC
22 Manning would have learned of the video's content being quoted by Mr.
23 Finkel, as opposed to the actual book. And so we'd request the Court

1 to take judicial notice of Defense Exhibit Hotel Hotel. And with
2 regards to the actual book, even though the Court has taken judicial
3 notice of the book, the government should -- if there's a particular
4 excerpt or whatnot from that book, they should be -- be forced to
5 indicate what excerpt they want instead of the entire book. And then
6 we can litigate the relevance of that.

7 MJ: All right. I notice Mr. Finkel is not on either side's
8 witness list.

9 CDC[MR. COOMBS]: No, Your Honor.

10 TC[MAJ FEIN]: No, Ma'am. Or that is correct, ma'am.

11 MJ: All right. I've already taken judicial notice of the book.
12 What I'm going to do is -- I'll take judicial notice of the entire book.
13 And I will also take judicial notice of the Washington Post article.
14 You can make any arguments that you wish to make with respect to
15 whether the inferences are that he read the book, he didn't read the
16 book, he read the article, he didn't read the article, and present
17 that to the fact-finder.

18 CDC[MR. COOMBS]: Yes, Your Honor.

19 MJ: So Defense Exhibit -- Prosecution Exhibit 186 for
20 identification is admitted, as is Defense Exhibit Hotel Hotel. Is
21 there anything else we need to address before we proceed to the
22 arguments with respect to the 641 -- the 18 United States Code,
23 Section 641 offenses?

1 TC[MAJ FEIN]: No, Ma'am.

2 CDC[MR. COOMBS]: No, Your Honor. If we could though take just a
3 ten minute break before we go into argument.

4 MJ: All right. Why don't we make that 15 minutes. Court will
5 -- is in recess until 20 minutes after 10.

6 **[The court-martial recessed at 1006, 18 July 2013.]**

7 **[The court-martial was called to order at 1025, 18 July 2013.]**

8 MJ: Court is called to order. Let the record reflect all
9 parties present when the Court last recessed are again present in
10 court. Mr. Coombs, are you ready to proceed?

11 CDC[MR. COOMBS]: Yes, Your Honor. And, Your Honor, what I'd
12 like to do is address the GALs separately. So handle the other 641
13 specifications, let the government respond to that, and then
14 separately argue.

15 MJ: That's fine.

16 CDC[MR. COOMBS]: Well, Your Honor, the defense's position on
17 this is that the government has never charged the correct property in
18 this case. They've charged the databases. And what they charged for
19 each of the specifications was a database, and then they did the
20 qualifier of explaining what the database contained, but they charged
21 the database.

22 MJ: Let me ask you a question, Mr. Coombs, just right off the
23 bat. What's your definition of a "database"?

1 CDC[MR. COOMBS]: Well, in that instance there -- I know the
2 government went to Black Letter Law or --
3 MJ: Black's Law Dictionary?
4 CDC[MR. COOMBS]: Black's Law Dictionary, excuse me. Or just
5 common understanding perhaps of what you might interpret a database
6 to mean. But the important thing here is when they charge database on
7 the Charge Sheet, the database has a meaning. And in that case the
8 meaning is the database. And in this instance ----
9 MJ: Well, it says the database containing records.
10 CDC[MR. COOMBS]: Right. And that was a description of what
11 the database was. When you take a look at -- and the reason why
12 that's an important thing to -- to look at, Your Honor, when you see
13 the word "database", and you see what they've charged it in this
14 case; the CIDNE-I database, the CIDNE-A database, the SOUTHCOM
15 database, those are particular things. Those are items -- databases.
16 And the description containing the certain amount of records that was
17 description of what they were charged in the database, much like you
18 would charge a particular -- like if a car was stolen; you're
19 charging theft of the car, you know, containing CDs or containing
20 other items, but it's clear what you're charging is the car. And
21 when we filed our Bill of Particulars and -- when you look at what
22 the government wants to do -- and I'll get to their kind of logic in
23 a moment, but the defense filed a Bill of Particulars. And that is

1 when you would find out exactly what they're charging and under what
2 theory. And in that that response they said, it is clear the
3 property at issue, namely the specific identified databases. That
4 was the government's response; the specific identified databases.
5 And the Court held -- when you looked at the Bill of Particulars, the
6 Court concluded that the government's response to the defense's
7 request for the Bill of Particulars was sufficient to satisfy the
8 purpose of the Bill of Particulars. And it's clear from then their
9 response that what they were alleging that he stole was the specific
10 identified databases. And so when you ask me, how do I interpret
11 databases, I interpret it based upon the government's Bill of
12 Particulars response, and that is the specific identified databases.

13 MJ: How do you have a database without records?

14 CDC[MR. COOMBS]: Easy. I mean, I can create a database -- so
15 -- taking it out from this case I can create a database that has
16 nothing in it yet. And a database is just simply like Westlaw --
17 Westlaw's a database. You can have a Westlaw database that doesn't
18 have any records yet. It's no less a database. And in this instance
19 the government, as we know from their instructions, they -- they
20 wanted to charge, and they did charge, and they wanted to prove, and
21 did try to prove, the value of the database. So when you look at the
22 proposed instruction by the government -- and let's use
23 Specification 4 of Charge II, the government says in that

1 specification that the elements that this Court should have
2 instructed on that -- is that in this case the CIDNE-I database
3 belonged to United States government. That the CIDNE-I database was
4 a value of more than a thousand. And then for the lesser included
5 offense, they said the offense of stealing or converting the CIDNE-I
6 database, of a value less than a thousand, is a lesser included
7 offense of the offenses within Specification 4. And they did this
8 for all the databases. And so it's clear that the databases what the
9 government was proving -- and we know that because then we take a
10 look at the evidence that they offered in the case. And they offered
11 evidence of how much does it cost for a server -- a virtual server,
12 how you create the database. And we had testimony from Chief Nixon
13 about the fact that -- and this is with regards to the GAL, but it's
14 equally applicable here that you can have the database without the
15 information, but you can't have the information as far as how it was
16 set up in the GAL without the database. Well, in this case here,
17 when you're charging the database -- and that's what the government
18 has charged, it's clear that that could be what they were intending
19 to prove. And, in fact, that is what they charged and attempted to
20 prove. But in the government's response, which is very difficult to
21 discern, they wanted to make it seem as if it's clear to everybody
22 involved that, when they said database, that that actually applies to
23 what PFC Manning allegedly did, in fact, take. And if that were

1 abundantly clear, then you wouldn't need 31 pages of motion from the
2 government to explain that. And you wouldn't need 25 pages from the
3 defense to say we don't understand what they're alleging. But it
4 seems like what the -- the government is trying to say is that the
5 word database encapsulates everything under the sun. They want to
6 say, you know what, when we say "database", what we really mean was
7 the records in the database. And when we say records, what we really
8 mean was the copy of the records. And when we say copy of records,
9 what we really mean was the information within the copy of records.
10 And when we say information, what we really mean was the exclusive
11 possession of that information. That is the extent to which the
12 government wants to extrapolate from the word "database". Well, the
13 problem with that is words matter. And the government on more than
14 one time has used that refrain, words matter. When we were asking
15 for documents from Quantico, and we thought documents fairly
16 encapsulated emails, the government said no, no, no, words matter.
17 If you wanted emails, you should have asked for emails. When we said
18 we wanted investigative papers and damage assessments during
19 discovery, the government came back and said, oh, no, words matter.
20 What you really should have asked for was working papers. When we
21 say that we wanted a damage assessment, what they really said was,
22 oh, you should have asked for draft or interim. That's -- that's
23 words matter. Well, words do matter. And they matter the most when

1 it's on a charge sheet. That's when words matter. And the
2 government chose to charge this way. And this Court has previously
3 held the government's feet to the fire on how they charge. When you
4 take a look at Appellate Exhibit 515, when it was dealing with 793
5 offenses, and the government was trying to argue that, hey, we can
6 take advantage of the information clause and we don't have to prove
7 reason to believe.

8 MJ: You mean the documents clause?

9 CDC[MR. COOMBS]: Documents clause. Thank you, yes. We don't
10 have to prove reason to believe. And this Court said, you know what,
11 you had an option. You could have charged under the documents clause
12 or you could have charged under the information clause. And you
13 chose the way you charged, and now you need to own the way you
14 charged it. This case is no different. And when you look at that
15 actually -- documents information. Even in the 793 offense, there is
16 a distinguishment between documents and information. And in this
17 case the government has had over a year to draft these offenses --
18 after the initial drafting when they re-preferred the charges. They
19 definitely thought through how they wanted to draft it. But
20 unfortunately what they didn't do is read 641 cases. Because if
21 they read 641 cases, they would see that there is a difference
22 between a record, a copy of the record, and information contained in
23 the record.

1 MJ: That's what I would like you to focus on, Mr. Coombs,
2 because as I'm looking at the Charge Sheet it says that "did steal" -
3 - in that Private First Class Bradley E. Manning did at or near
4 whatever, steal, purloin or knowingly convert to his use, or use of
5 another, a record or a thing of value of the United States or a
6 department of the agency thereof -- Specification 4 -- and they're
7 all structured the same way; The Combined Information Network
8 Exchange-Iraq database containing more than 380,000 records. Now I'm
9 not going to interrupt your argument, but I'm going to ask you two
10 things. Argue assuming that I rule completely in your favor with
11 respect to that this doesn't encompass records. Then I would like an
12 Alternate B argument, assuming that I find that it does, what is the
13 defense position with respect to information and value?

14 CDC[MR. COOMBS]: Okay. So the first one is easy; if it
15 encompasses database. So when you look at database, the 641 cases are
16 all the same when you -- when you see how they charged the items. If
17 it's information, like the *DiGilio* case, *Hubbard*, *Jeter*, *Jordan* case,
18 they all do the copy -- they charge the copy and then they charged
19 the information separately. So the -- even though the federal
20 jurisdiction has more of -- with indictment gives a lot more
21 information, the actual charge that they charge though, which is very
22 similar to us, that follows and tracks 641 exactly, when they are
23 charging a copy, they charge a copy. When they charge information,

1 they charge information.

2 [The Civilian Defense Counsel displayed Appellate Exhibit 610 on the
3 projection screen in full view of all court-martial participants.]

4 So to answer the Court's question, if you determine that
5 they charge database, and when they said database in this case, it's
6 important to look at the actual specification then. When they say
7 that -- to wit the Combined Information Data Network Exchange-Iraq
8 database containing more than 300,000 -- 380,000 records, what
9 they're talking about is the database, and they do a description of
10 the database. And the way you would prove that under 641 is cost of
11 production, the equipment and maintenance of the database. So if
12 someone actually stole the database, that's how you would prove it.

13 So in the defense's position, if the Court determines to
14 hold the feet of the government to its burden of what it proved or
15 what it alleged, I should say, then in this instance the 917 should
16 be granted because it's clear the evidence came out that the database
17 was not taken. Everyone realized that besides the government in how
18 they charged it. Now, if the Court says, you know what, when they
19 said "database", and they used the description of containing more
20 than 380,000 records, then that encapsulates records. So you're on
21 notice of both database and records. If the Court says that, then,
22 again, in this instance, a 917 should be granted. The reason why is,
23 we again had evidence the records were never taken from the

1 government. The database and the records always remained with the
2 government. We had multiple witnesses say that at no time could they
3 not access CIDNE-I, CIDNE-A, of the SOUTHCOM; that those records
4 always were maintained. They were never taken from the government's
5 possession. And so now what you have is you have perhaps copies of
6 records and information; so the last two things. And so just looking
7 at it from the -- in the abstract of how you prove these things, all
8 the cases for 641 cases for records, it's cost of production of the
9 original. So that is the people who are working on it, typing into
10 it, how long it took to create the record. So that's the ----

11 MJ: And what cases are you relying on for that one?

12 CDC[MR. COOMBS]: The -- well, all the 641 cases; the *DiGilio*,
13 the *Hubbard*, *Jeter*, *Jordan*, and *Morison* cases -- that line of cases,
14 as well as *Collins*. Those 641 cases, when you read them, what you
15 see is how -- what the government charged and then how you proved it.
16 And so, for example, the -- I believe it is -- I think it's the
17 *Jordan* case, but I'm not for sure -- there's an original so they
18 valued the cost of production of the original. With regards to
19 copies of the records the -- mainly all these cases that I just cited
20 for you, then it's the cost of production of the copy. So the use of
21 the -- the printer in the particular government office -- the paper
22 that was used to copy it, the time that was used to copy it. So the
23 cost of production is how you prove a copy of the records because

1 that is what you are valuing. You're valuing the copy of the record,
2 and so what -- how you do that, the cost of production of it. That -
3 ---

4 MJ: Let me ask -- let me ask you a question. On those copy
5 cases, did -- each of those copy cases, did the accused or the
6 defendant actually go back to the original records and make a copy,
7 or did the person take the copy or steal a copy that was already
8 made?

9 CDC[MR. COOMBS]: The *Jordan* -- actually, the *DiGilio* is a
10 photocopy of the originals. So they took a photocopy of the
11 originals. The *Hubbard* case is the same way; it's copies of the
12 originals. The *Jeter* case is carbon paper. So they took the carbon
13 paper, which arguably is the copy of the original, and then they
14 returned the carbon paper. So -- but when you look at all those
15 lines of cases the -- in the allegation they actually charge what was
16 alleged to be taken; the copy. And then they value that. And in
17 those cases in which they charge information, in addition to that,
18 they, in fact, value the information.

19 MJ: What would be the cases that also charged information?

20 CDC[MR. COOMBS]: *Jeter* and *Jordan*, and important for us is
21 *DiGilio*. *DiGilio*, they charged photocopies. But if you look at
22 Footnote 10 in *DiGilio*, it says they -- they obviously did not charge
23 theft of information because if they would have charged theft of

1 information, they would have relied upon a thing of value and stated
2 the information. And -- so it's really easy -- like if you're going
3 to do a 101 of how the government should have drafted this offense,
4 it would have been PFC Manning did steal, to wit: copies of 380,000
5 records from the CIDNE-Iraq database and the information contained
6 therein. That would have been a sufficient specification to allege
7 copies of records and information. But that's not what the
8 government did. And when they -- when they failed to do that --
9 again, now they are trying to at this 11th hour ask the Court to --
10 they're not even asking for a variance. They're saying, hey, we're
11 perfectly fine with the CIDNE-I, CIDNE-A database containing more
12 than 380,000 records, even though they -- the records and the
13 database have never been taken from the government's possession.
14 It's clear that the ----

15 MJ: Does it have to be?

16 CDC[MR. COOMBS]: Yes, under the 641 offenses if what you're
17 saying is you're charging him to take something. And the reason why
18 -- and that's the second aspect of this slide, when you look at 641,
19 it's important not only to name the property, but once you do name
20 the property, that shows how you prove valuation of more than
21 \$1000.00. And what the government has done is almost kind of a
22 schizophrenic way of trying to prove -- they charged database and
23 records, they want you to argue -- they want to argue that, well,

1 okay, we said that we really meant copies of records and information.
2 Well, even assuming the Court would go down that line with them, they
3 haven't proven the value. So what they have done with copies of
4 records, they used the cost of the database.

5 MJ: Is there any case that you're aware of that says they can't
6 do that?

7 CDC[MR. COOMBS]: Yeah, all the cases that I just outlined for
8 the Court. Every one of these cases indicate when you're -- how you
9 prove that value.

10 MJ: Well, there's a variety of different ways to prove value.

11 CDC[MR. COOMBS]: It -- there is, Your Honor, but the cases
12 indicate for copies of records and then they -- if the Court looks,
13 you'll see when they say copies of records it is -- all right, the
14 amount of time it took to print it -- like per the *Collins* case. The
15 *Collins* case they charged copies of records and information. And in
16 *Collins* the Court said, look, we're going to avoid the information
17 issue. We're going to go ahead and go with copies of the records.
18 And the copies of the records -- the value, how we prove that was you
19 -- you used the copier. And so there's ink, there's toner, and
20 there's paper, and it's your time in copying that. And that's how
21 they got to their value. And value does matter and how you prove it.
22 Because when you -- when you take a look at all the 641 cases, every
23 one of these for -- like the copy of record, it is the cost of

1 production; every one of the cases of the copy. They're not mixing
2 and matching other things.

3 MJ: Now let me ask you a question on that. The 641 cases
4 involving the copy, do they say, all right, we've got this case on
5 appeal, we can get to the -- I believe most of those cases were
6 before the \$1000.00 threshold.

7 CDC[MR. COOMBS]: Right.

8 MJ: We can get to the \$100.00 threshold by going down the copy
9 theory, so we don't have to address the rest of this, or do these
10 cases say you can't value it any other way?

11 CDC[MR. COOMBS]: Well, none -- and in none of those other
12 cases did they try to value it any other way. So that's -- that's
13 what the defense is trying to argue -- all -- every one of those
14 cases, when they had a copy, they proved the value of the copy. And
15 it was through cost of production of the copy. They didn't attempt
16 to prove it some other way. And when you think about it just
17 intuitively, if -- let's say -- let's use just an outside example; I
18 go into Wal-Mart and I steal a sweater from Wal-Mart. And I leave.
19 I'm going to be charged with stealing a sweater from Wal-Mart, and
20 that's the way it should be charged, and the value of the sweater.
21 Under the government's theory, you go into Wal-Mart and steal a
22 sweater, they're going to charge you with stealing from Wal-Mart.
23 And they're going to value the bricks and mortar to build Wal-Mart,

1 the greeter that meets you as you come in the door -- how much they
2 get paid to greet people, the person who put that sweater on the
3 shelf. That's all this stuff -- that's all the value of the
4 database.

5 MJ: Does it make any difference if -- I mean, as I'm seeing --
6 as I'm looking at this, you have a database management system; you
7 have a database, you have records, and you have information. Now in
8 this case I believe the allegations are that PFC Manning took entire
9 databases and the records therein. So if that's the case, as opposed
10 to stealing the sweater, does it make a difference if you steal
11 everything in Wal-Mart?

12 CDC[MR. COOMBS]: It would. So let's -- let's carry that
13 analogy. Let's say I'm very, very good at what I do, and I wait
14 until Wal-Mart closes, I go in and I steal everything off the shelves
15 to where there -- there's nothing left in Wal-Mart. You still cannot
16 value Wal-Mart; the building, the mortar, the employees. That has
17 nothing to do with that. You'd still then say, okay, you stole --
18 you know, let's say a million dollars-worth of merchandise and that
19 would be how you would charge it. And a really good case to -- to
20 view on that is *U.S. v. Veloria* case when we are talking about the
21 identity of the property. Both *U.S. v. Veloria* and *U.S. v Wilkins*
22 stand for both the identity of property and the identity of who you
23 escape from. That idea is important because what you charge is what

1 you ultimately have to prove. And so in *Gloria* you have an
2 individual who steals a debit card and goes on a shopping spree. And
3 he's charged with -- with stealing from USAA. And then everyone
4 agrees, you know what, he really -- he didn't steal from USAA, he
5 stole from the owner of the debit card. And so during the guilty
6 plea, they just changed that -- they don't do anything with the
7 Charge Sheet. And ACCA says, wait a second, you charged stealing
8 from USAA. So you need to prove stealing from USAA. But more
9 importantly for our case, ACCA talks about a footnote that not only
10 that, you -- you charged stealing \$500.00 -- more than \$500.00 --
11 money. We're not -- we're not going to put aside this issue because
12 we're going to rule against you on changing the identity of the
13 person, but you didn't charge the right thing. He never took money.
14 He took merchandise. And, so he used the debit card buy a whole
15 bunch of non-important items. That's what he actually took. And so
16 you -- you've even got the property wrong.

17 In the *Wilkins* case -- and, I'm sorry, the *Wilkins* case is
18 -- is the wallet case -- you have an idea of being charged with
19 taking \$75.00 -- property, and then they ultimately proved that he
20 took the wallet, but he was charged with the \$75.00.

21 MJ: Well, here you have a database containing records. In that
22 case, if you had a wallet containing \$75.00, wouldn't you have the
23 theft of -- if he didn't have the \$75.00, you'd still get the wallet,

1 right?

2 CDC[MR. COOMBS]: Well, if -- again ----

3 MJ: Or if he didn't have the wallet, you'd still get the
4 \$75.00?

5 CDC[MR. COOMBS]: Perhaps. And -- that's why, again, in this
6 case, if -- if you thought that the records was not descriptive of
7 the database, you might get to database and records. But you
8 certainly don't get to copies of records and information. And the
9 reason why you don't get there is, when we incorporate 64 ----

10 MJ: Well, let's -- let's tailor our argument that way because I
11 can tell you pretty much that's the road I'm going on.

12 CDC[MR. COOMBS]: Yes. So when you get there -- so if you
13 say, okay, look, I think the database that you allege -- and when you
14 say containing more than 380,000 records, that wasn't descriptive,
15 that was ----

16 MJ: Yes.

17 CDC[MR. COOMBS]: ---- alleging both.

18 MJ: Yes.

19 CDC[MR. COOMBS]: ---- okay, so the defense would take issue
20 with that.

21 MJ: I understand.

22 CDC[MR. COOMBS]: But even when you get there then -- okay --
23 well, then -- when you come down to what's important then for the

1 917, did you value -- did he take the database and did you value it?
2 Well, he didn't take the database. So we can scratch that out. So
3 if the Court were, in fact, going to be lining through something for
4 findings, let's say on this, you'd line through database 'cause he
5 still -- he clearly didn't steal the database. The database was
6 never taken. So now you are left with 380,000 records. Well, he
7 didn't steal the records. He stole copies, because those records
8 were never taken from the government's possession. So if -- even if
9 the Court gets there, then what's the value of the records? Well,
10 they did do a kind of how -- you know, how much does a specialist get
11 paid and they worked on, you know, entering information in the
12 database. They valued the record, but not the copy of the records.
13 And the copy of the records would be the cost of production. So if
14 they actually charged correctly, then they would have said, okay, the
15 cost of production. So it would have been the CD that was used to
16 burn the records down on. And it would have been the time that PFC
17 Manning used in order to burn those re -- burn that CD. If that CD
18 was government's property, it would have been the value of the CD.
19 That would have been the -- the cost of records. And that probably -
20 - almost definitely would not get you over the \$1000.00. And that
21 would be why a good prosecutor would say, you know what, I'm going to
22 charge also and the information contained therein. And if you did
23 that, then you would have to do kind of a thieves market for the

1 value of the information. But the problem with the government's
2 theory is, they seem to think that, okay, we are going -- we're going
3 to allege database, and we are going to do that, and they're -- kind
4 of the reason why we're going to do that is we know we spent millions
5 and millions and millions of dollars creating this database. And
6 surely we throw enough zeros at the Court, that's going to be enough
7 to get over the \$1000.00 threshold. But they ignore the fact that he
8 never took the database. And -- and so even if the Court were --
9 were inclined to say database and records, we still have a problem
10 here, he hasn't been charged with the right thing. The right thing
11 was copy of records and information. And there's no way that you
12 extrapolate from database records to copies of records and
13 information. And that is not only borne out in all the 641 cases
14 that clearly say when we do copies of records, you allege them. And
15 -- and that's, again, *Hubbard*, *Jeter*, and *DiGilio*. And then when you
16 have information, you allege it under a thing of value. And that is
17 ----

18 MJ: Well, let me ask you a question on that. Can -- can you
19 have a record without information?

20 CDC[MR. COOMBS]: You could.

21 MJ: How?

22 CDC[MR. COOMBS]: A photograph. So you could have -- and
23 that's -- I believe that's the *DiGilio* case. You -- you could have a

1 photograph of something and that would not have information in it.
2 So if -- the -- the one case in which he sold to Jane's Weekly -- and
3 actually it's not the -- well, the -- and I'm drawing a blank on the
4 case. But there -- one case ----

5 MJ: There are a lot of these cases. I understand that.

6 CDC[MR. COOMBS]: ---- when he sold to Jane's Weekly, a
7 photograph, and that was charged as a record. And they charged it
8 not as a copy because it was the original. The individual cut off
9 the secret -- the border basically that had the classification of the
10 photo.

11 MJ: *Morison*?

12 ATC[CPT von ELTEN]: Yes, ma'am.

13 CDC[MR. COOMBS]: All right. I will say, yes, to that.

14 MJ: Okay.

15 CDC[MR. COOMBS]: So -- yeah -- so *Morison*. So he -- he cuts
16 off the border -- that's a record. And that would not have
17 information, as we understand the value of information. So that
18 would be an example of that where you could have 380,000 photographs.
19 The -- the information, when you charge that, that then bears out in
20 all the 641 cases, and the government's supplement motion, and the
21 cases we gave to the Court, if that were an issue, then -- then you
22 would have an argument of can you charge classified information? You
23 would have an argument of First Amendment and whatnot. And ----

1 MJ: With classified information?

2 CDC[MR. COOMBS]: Even with classified information you would
3 have an argument ----

4 MJ: What would be your First Amendment argument with classified
5 information?

6 CDC[MR. COOMBS]: Well, I would tell you that if I were going
7 to make that one, that would have been made a long time ago with all
8 my other motions because I would have said, ah, they charged
9 information, I'm going to allege that -- even though there are
10 circuits that say, yeah, information falls under thing of value, and
11 that was Congress's intent, there are -- there's contrary law. And
12 so I would have argued that ----

13 MJ: By one circuit, right?

14 CDC[MR. COOMBS]: Yes, Your Honor. And I would argue that,
15 and I would have argued for the rule of lenity. But they didn't
16 charge information. And -- even now when you take a look at the
17 government's motion and response motion, they seem to have bounced
18 back and forth on all these terms, as if -- sometimes they're
19 alleging, yeah, he took the database and records, and other times
20 they're saying, well, it's clear, you know, he took copies of records
21 and the information therein. And it's clear that he violated our
22 exclusive possession of that information. But none of that's clear.
23 And even though we're in a notice pleading, that's not the situation

1 in this case where you actually -- you pled something and you own it.
2 And what you should own is what you pled, and that's a database, or
3 at most maybe database and the records. But they haven't proven
4 that. And, you know, when you -- when you take a look at like the
5 wallet example, again -- and let's take money out because money has
6 an intrinsic value that you look and see. Let's say he was charged
7 with stealing a wallet and five business cards. And ultimately, you
8 know, that's -- that's what we see and we're trying to prove value,
9 where how -- the way you prove the value for the business cards would
10 be charging the information. I mean, perhaps the copy -- the actual
11 records, excuse me, if the business cards had -- you know, they were
12 made out of gold or something, and then you could say, wow, this is a
13 very, very expensive business card. But more than likely the
14 business card would be information. And then you'd be valuing the
15 information. So you'd be proving the five business cards had a
16 certain value. And the way that you'd do that is have somebody come
17 in and say, look, the information on these bus -- on this business
18 card, when you put it collectively or independently, has value.

19 MJ: So when it can -- where I'm having a little trouble here --
20 so taking that analogy and assuming the charge sheet would have to
21 read, stole a wallet, five business cards, and the information in the
22 business cards?

23 CDC[MR. COOMBS]: Right. And when -- when you take a look at

1 the 641 offenses -- if you're charging for a 641 -- if you're
2 charging for, you know, under 121, you're saying what he stole of a
3 value of something, and, again, I guess you would have to prove the
4 value of the card. But for a 641, the way it lays out of record,
5 voucher, money, or thing of value, then you need to -- you need to
6 fit into one of those things. Of -- If it's money, fine, you plead
7 that. If it's record, you plead that -- or copy of record. And the
8 thing of value is where you find the information. So every case in
9 which they -- they charge information, it was under a thing of value.
10 And, again, the majority of the cases kind of avoid the concern on
11 information because the copy of the record could independently get
12 them to the 641 outcome that they're asking for.

13 So based upon the government's responses, they -- they are
14 not asking for any variance under 603. They're going straight with,
15 we charged what we charged and you were put on notice. And, again,
16 when you go back to their Bill of Particulars and you go back to
17 their instructions, there's no way that you could get copy of records
18 and information from the way they charged. And because of that the
19 government hasn't proven, even with all the evidence taking in light
20 most favorable to the government and drawing all reasonable
21 inferences, you do not have an item that they've alleged actually
22 being taken. It's never been taken. And then, obviously, what was
23 taken they didn't charge. And even what was taken, they never

1 valued. So you've got multiple problems with the government's 641
2 charges in this incident.

3 MJ: All right.

4 CDC[MR. COOMBS]: So subject to your questions, ma'am.

5 MJ: The chart that you're using has not been marked. We need
6 to have it marked as an appellate exhibit.

7 CDC[MR. COOMBS]: Yes, ma'am.

8 MJ: Okay. No, I think -- yes, let me -- I do have one more
9 question. Your brief talks about the government requiring the -- the
10 need to prove substantial interference with the government's
11 interest. Now there's two different theories; you have your stealing
12 and your purloining, as well as your knowingly converting; does that
13 element apply to both?

14 CDC[MR. COOMBS]: Yeah -- well, I mean -- I guess the
15 government's ----

16 MJ: I believe my instruct -- I'm sorry, go ahead.

17 CDC[MR. COOMBS]: ---- the -- yeah, the government's gone back
18 and forth on whether or not purloin is -- is one of the theories
19 they're going forward on. But even if it is, I think it doesn't
20 really matter -- when you -- the Supreme Court indicated that
21 certainly every steal is a conversion. But ----

22 MJ: I think that's the other way around.

23 CDC[MR. COOMBS]: No. I mean, every -- every time you steal

1 something it would be a ----

2 MJ: You convert it?

3 CDC[MR. COOMBS]: ---- a conversion. And every time -- that a
4 conversion would not necessarily be a theft. And so, you know, the -
5 - in this instance then they would have to prove at least substantial
6 interference in order to meet either one of those. So I guess the
7 idea of -- of taking the property, either permanently or temporarily,
8 would have to be a substantial interference under the defense's
9 position.

10 MJ: All right. Thank you. And you can have that marked at
11 recess, unless you have a copy ready to go. Mr. Coombs, do you mind
12 if we leave that chart up during the government's argument?

13 CDC[MR. COOMBS]: Not at all, Your Honor.

14 MJ: Or least have it available to be put up. Captain von
15 Elten?

16 [Pause]

17 ATC[CPT von ELTEN]: Ma'am, the Charge Sheet alleges that
18 databases containing records are stolen, it also specifically adds a
19 thing of value in the Charge Sheet, which puts the accused on notice
20 that information would be at play.

21 MJ: How does that put him on notice that information would be
22 at play?

23 ATC[CPT von ELTEN]: A thing of value as it plainly means

1 anything -- broadly -- should be broadly construed in accordance with
2 the definition set forth in the government's brief about a thing is
3 anything including a property right or ownership.

4 MJ: So if you put a thing of value, that puts the defense on
5 notice of everything under the sun?

6 ATC[CPT von ELTEN]: Everything related to the intrinsic
7 qualities of the charged property. Ma'am, the United States defined
8 database as a collection of records and a compilation of information.
9 That definition is in accordance with Black's Law Dictionary.

10 MJ: Are you asking me to take judicial notice of that
11 definition?

12 ATC[CPT von ELTEN]: Yes, Ma'am.

13 MJ: Mr. Coombs, any objection?

14 CDC[MR. COOMBS]: No objection to taking judicial notice of
15 the definition, Your Honor.

16 MJ: Okay. Go ahead.

17 ATC[CPT von ELTEN]: Database -- the use of the term database is
18 important because it puts the defense on notice of many things; one,
19 the source of the information. It also gives the accused notice that
20 the database is electronic in nature. And that's important for
21 defense's arguments regarding copies and originals, and the
22 difference between the two. Also, the database gives notice by
23 charging the CIDNE database versus NCD database. It gives specific

1 notice of the types of information at issue as it's related --
2 inherent to the database in the records that would be contained in
3 there.

4 The United States would direct the Court's attention to
5 *United States v. Bottone* where the 2nd Circuit upheld a charge of --
6 under a different section, 2314, but a charge where -- it was
7 documents related to cultures, and what was actually stolen in that
8 case were a photocopies made -- not with government property, but
9 made by the defendants in that case themselves. But the 2nd Circuit
10 upheld that as being -- as being documents.

11 MJ: What type is the -- what type of authority would a case
12 interpreting a different statute be with respect to this statute?

13 ATC[CPT von ELTEN]: It would be persuasive, ma'am.

14 MJ: Okay.

15 ATC[CPT von ELTEN]: Ma'am, electronic records are created by
16 downloading them to a computer. And the Charge Sheet gives notice of
17 that by defining the specific database and the records.

18 MJ: How does it give notice of a copy?

19 ATC[CPT von ELTEN]: Because -- to access a record from a
20 database inherently and to pull it down -- to remove it from the
21 database is to create a copy by its very nature. It exists -- it
22 coexists in multiple places simultaneously because it's electronic.
23 The records remained the property of the United States government at

1 all times. And that's why the defense reliance on Veloria is not
2 appropriate here because the ownership of the records is not in
3 dispute. PFC Manning created the records that he stole and converted
4 with government property, thus they remained United States government
5 property at all times.

6 MJ: Okay, you just said he created the records, he stole, and
7 he converted. What is the government's theory or theories of how
8 this was accomplished?

9 ATC[CPT von ELTEN]: Conversion, first, ma'am, would be done in
10 two ways. The first way would be by taking records -- the United
11 States records and exporting them to an unauthorized party;
12 WikiLeaks. The second would be he deprived the United States
13 government of the exclusive use of the information.

14 MJ: So he deprived -- so is that -- is that your theory -- your
15 stealing theory or your purloining theory?

16 ATC[CPT von ELTEN]: So -- the stealing and purloining would go
17 to the first conversion theory as well, ma'am. That by taking United
18 States' property out of the United States' possession into his
19 possession -- the crime is completed there, but it also --
20 furthermore, by exporting those records to an unauthorized party that
21 also is just an additional step in effect.

22 MJ: So the giving to -- or communicating to unauthorized party,
23 is that where the conversion steps in or is it a conversion from the

1 beginning?

2 ATC[CPT von ELTEN]: It's a conversion -- it's a conversion once
3 they are removed from the exclusive possession of the United States
4 government. If it were a rifle, for instance, in a locker, and I was
5 to take it to my personal residence, I have stolen and converted
6 rifle at that point. The conversion of the information occurs when
7 the information is disseminated beyond unauthorized personnel.

8 MJ: All right, the instructions I'm going to have say that for
9 conversion, the misuse must seriously and substantially interfere
10 with the United States government's property rights. How does it do
11 that in this case?

12 ATC[CPT von ELTEN]: Beause the United States has a well-defined
13 interest in exclusively possessing that information. There's been
14 much information presented discussing that. And once it leaves the
15 exclusive possession of the United States, the United States rights
16 and interests are lessened and significantly decreased.

17 MJ: Okay.

18 ATC[CPT von ELTEN]: I would point the Court to Mr. Lewis'
19 testimony about that. Back to the point about the electronic
20 records, ma'am, the defense rely -- talks about *DiGilio*, and the
21 other case would be *Friedman*, where photocopies or carbon paper are
22 charged, but that's -- that's different because the photocopy or
23 carbon paper is something specifically different. Here electronic

1 records have been charged and the evidence has been related directly
2 to the electronic records that were stolen and converted.
3 Furthermore, Your Honor, the accused himself referred to the
4 databases -- or the rec -- to the property he stole and converted as
5 databases in his chats with Mr. Lamo.

6 MJ: What difference does that make?

7 ATC[CPT von ELTEN]: It means that he thought he'd stolen
8 databases and records. Furthermore he referred to them as being the
9 ----

10 MJ: So if the charge sheet is defective, the government can
11 come in and say, well, the accused knew that -- like in *Wilkins*, when
12 the person escaped from the custody of A, but charge sheet said B,
13 the fact that the accused knew it was B and not A is enough to save
14 the specification?

15 ATC[CPT von ELTEN]: We're saying that it's -- that we charged A
16 and it is A, and the accused said it was A. In *Wilkins* it was two
17 totally different things; a wallet and money. Here we're saying we
18 charged electronic records ----

19 MJ: No, I'm talking about -- maybe I have the wrong case -- the
20 case with the escape from custody of Person A instead of Person B.

21 ATC[CPT von ELTEN]: So in that case the United States' argument
22 would be that -- it would be saying that the -- weren't -- prop --
23 government -- that's an ownership issue and this is -- that'd be a

1 source and -- as pointed out earlier, the database is defined by the
2 source of it. So it would be saying if we charged -- got records
3 from NCD and proved records from some other database, that argument
4 would be appropriate in those circumstances.

5 MJ: Even though the accused knew they were from the other
6 database?

7 ATC[CPT von ELTEN]: But our cases we're saying something
8 slightly different.

9 MJ: Go ahead. Let's just -- we'll move on.

10 ATC[CPT von ELTEN]: Furthermore, the accused also described the
11 search functionality in his chats with Mr. Lamo.

12 MJ: Okay, well, let's -- I don't care what the accused
13 described. Go ahead.

14 ATC[CPT von ELTEN]: Yes, ma'am. Information is related to the
15 charges in two ways; one, it's a thing of value as charged; and, two,
16 it's an intrinsic quality. The defense talked about a record -- a
17 photograph not having information in it. The United States would
18 point the Court's attention to *Seagraves*, which has been referenced
19 in many of the 641 cases. And in that case maps were stolen and
20 their value was assessed at over \$5000.00 based on the information
21 contained in the maps.

22 MJ: Did the government -- is that part -- that case in the
23 government's brief anywhere?

1 ATC[CPT von ELTEN]: No, ma'am.

2 MJ: Okay, can you please provide the Court with it after your -

3 ---

4 ATC[CPT von ELTEN]: Yes, ma'am.

5 MJ: ---- after the recess? Thank you.

6 ATC[CPT von ELTEN]: So information is an intrinsic quality in a
7 record. In *Lambert*, the Court said that a man of common intelligence
8 would understand -- in 1979, the electronic record necessarily
9 includes information. In 1979, computers were much less widespread
10 than they are today information should be understood. Also, ma'am,
11 as intangible property falls within the broad treatment of 641 as
12 addressed in the briefs. I'd like to talk a little bit about the 9th
13 Circuit.

14 MJ: Go ahead.

15 ATC[CPT von ELTEN]: The 9th Circuit's understanding of 641 and
16 applying it only to tangible property totally defeats the
17 Congressional and Supreme Court's interpretation of the statute.

18 MJ: Okay, are you talking *Chappell*? You talking the *Chappell*
19 case?

20 ATC[CPT von ELTEN]: Yes, Ma'am.

21 MJ: Okay.

22 ATC[CPT von ELTEN]: And, also -- again, as discussed later in
23 *Tobias*. In *Tobias*, the 9th Circuit, first of all, acknowledges the

1 existence of what they call -- what they deem classified information
2 exception. The 9th circuit is says when it acknowledges that even
3 though it's not applicable in that case, that it can be applied, just
4 not in those circumstances.

5 MJ: Talk to me about the classified information exception.

6 ATC[CPT von ELTEN]: It doesn't -- the 9th Circuit doesn't
7 expound on what that means or what the circumstances are, but given
8 their ruling in *Schwartz*, which conflicts with their rulings in
9 *Tobias* and *Chappell*.

10 MJ: But that's interpreting a different statute, too, right?

11 ATC[CPT von ELTEN]: Yes, ma'am. It's interpreting a different
12 statute as well. It would seem they're saying in certain
13 circumstances, also as recognized Judge Winter, who also does not
14 define circumstances would be, that -- where information is at issue
15 it can be -- it can be subject to 641 as intangible property.

16 MJ: Okay.

17 ATC[CPT von ELTEN]: The second part is that the 9th Circuit
18 reaches that determination by relying on its -- on a common law
19 understanding of conversion, which is wholly inapplicable because
20 Congress used words in drafting 641 that aren't within the common law
21 at all, those being steal and purloin. So what the 9th Circuit
22 effectively does is to say we have common law restriction for this
23 one word, then Congress, says, okay, we want to fill the gaps and

1 crevices, and we want to create a broader reach in a modern trend of
2 drafting laws. And the 9th Circuit -- and so we're going to use the
3 terms not in the common law, without those restrictions, and then --
4 and the 9th Circuit in contravention of the Supreme Court, *Morissette*
5 says, well, we're going apply those restrictions any way. They don't
6 say that a thing of value doesn't by its plain text apply to
7 intangible property.

8 MJ: Now is there a different -- distinction between tangible
9 property -- when the government charges tangible property containing
10 information, and the government just charging information or
11 intangible property without tangible property going along with it?
12 Well, let -- let -- let me begin with -- what's the government's view
13 on whether computerized records are tangible or intangible property?

14 ATC[CPT von ELTEN]: The United States' view is that it's
15 tangible property in accordance with the *Morison* case, I believe -- I
16 can get that for you, ma'am -- it's cited in the brief ----

17 MJ: I have it.

18 ATC[CPT von ELTEN]: ---- where it talked about elect --
19 electronic deposits that were reducible to a tangible form, that
20 being money or treated as tangible property.

21 MJ: So the information that you're talking about -- so there --
22 there can be two different scenarios then where information goes
23 along with tangible property and a potential wherein intangible

1 property alone is charged -- somebody goes and memorizes something
2 and -- a bank card and goes to bank and uses it?

3 ATC[CPT von ELTEN]: Yes, ma'am. That would be different types
4 of intangible property. Information is always an intangible
5 property. The -- so in that case the information would always be
6 intangible, but it could always be an intrinsic component of an
7 intangible piece of property.

8 MJ: And is that the government's position is with respect to
9 this case?

10 ATC[CPT von ELTEN]: With respect to valuation, information is
11 intrinsic part of the tangible document. With respect to conversion
12 information is intangible. Documents themselves are tangible.

13 MJ: What's the difference between conversion and stealing for
14 tangible and intangible information?

15 ATC[CPT von ELTEN]: The government's position is, for stealing
16 it doesn't matter because conver -- only conversion has that common
17 law restriction to tangible goods, personal property, chattels,
18 things of that nature.

19 MJ: Okay.

20 ATC[CPT von ELTEN]: The defense talked about that these are
21 copies of records and that the evidence the United States offered
22 doesn't support valuation, but, again, these are electronic records.
23 They could not exist but for the databases and supporting

1 infrastructure without them.

2 MJ: Let's put the slide up. Let's use that on this valuation
3 piece here.

4 [The defense slide was placed on the projection screen in full view
5 of all court-martial participants.]

6 MJ: All right, before you begin, let's look at the top part of
7 the slide. Does the government agree that that's how you have to
8 prove value for each of those things?

9 ATC[CPT von ELTEN]: No, ma'am.

10 MJ: All right. What's your position?

11 ATC[CPT von ELTEN]: The position is that the records and
12 database are inherently intertwined and, thus, cost of production
13 equipment and maintenance goes to that. Furthermore, copies of
14 records in terms of valuation is not a meaningful distinction because
15 those copies are still United States records; they could not exist
16 but for the database. So the -- for under defense's term, we would
17 say that cost of production equipment and maintenance goes to -- goes
18 to those copies because those are still records. The word "copies"
19 has no meaning there. And then for information that the -- where the
20 evidence has shown that a lot of this infrastructure is put in place
21 to make that -- because -- because the information is what is
22 important, that cost of production equipment and maintenance would go
23 to information as well.

1 MJ: So is it the government's position -- I'll ask you the same
2 question I asked the defense -- I guess using the Wal-Mart analogy,
3 is -- does it matter if you steal a copy of a record or the entire
4 database?

5 ATC[CPT von ELTEN]: Yes, ma'am, it does matter. Because in the
6 Wal-Mart analogy one thing is by itself, but when you're taking the
7 entire contents of a store, that whole infrastructure is there to
8 support that. You know, the Wal-Mart, when it would do its
9 accounting, would recognize all that as part of the cost of selling
10 the goods would be -- you know, the depreciating the building and all
11 those other things. So the government's position would be, yes,
12 relevant if you stole the entire contents of Wal-Mart.

13 MJ: Assume for the sake of argument that PFC Manning -- well,
14 let's -- let's -- let's just take a real example that could be a
15 possibility in this case. Assume that there were, I believe, 74,000
16 records in the GAL. Assume that's what was proved stolen. Would the
17 cost of the entire maintenance of the database system be something
18 that the government could use to value that?

19 ATC[CPT von ELTEN]: Yes, ma'am. So I know defense hasn't gotten
20 into the GAL yet, but for the GAL, the -- Chief Nixon testified that
21 the way the GAL is created, and maintained, and distributed, it's
22 done at organization levels. So at Corps, they maintain the Corps
23 level, and then the way the Corps maintains it, is it gets

1 information pushed up from Divisions, it collects and assembles it,
2 and then pushes down -- it pushes it back down to the Division level.
3 And the same thing happens -- at the Division level it goes to and
4 from brigades, and back and forth. And I -- and Chief Nixon's
5 testimony was that it was at the Division level GAL -- that that's
6 what it looked like to him. And in this case the cost of production
7 of that portion -- all that -- because as Chief Nixon testified, but
8 for those pieces of equipment there could be no GAL; there would be
9 no functionality.

10 MJ: So if I'm understand -- okay, I'm understanding you for the
11 GAL. What you're saying is if part of a GAL is stolen that -- the
12 cost of production of that part of the GAL is what the government
13 believes could be used for value ----

14 ATC[CPT von ELTEN]: Yes, ma'am.

15 MJ: ---- not the whole GAL?

16 ATC[CPT von ELTEN]: Yes, ma'am.

17 MJ: Okay. Because my next question would have been, if one
18 address was stolen, could the entire production of the GAL be used to
19 establish value?

20 ATC[CPT von ELTEN]: Prorated share. Very small prorated share.

21 MJ: Okay.

22 ATC[CPT von ELTEN]: The support costs -- using those are
23 addressed -- justified by case law. In *May*, the United States

1 charged the defendant with converting flight time. And that United
2 States was not limited to evidence just for gasoline. They were also
3 able to use things that were intrinsic and apparent to -- to actually
4 creating the flight time; namely -- in that case, the United -- they
5 relied -- the government relied on pilot salaries, and mechanics'
6 salaries, and things of that nature that went to support the flight
7 time even though they were not actually involved during the actual
8 flights.

9 Similarly, in *Zettl*, the Court noticed that personnel costs
10 were appropriate. Transportation costs, which -- then further all --
11 and it left open the broad other actual cost. The United States'
12 position is these are actual cost of create -- of creating and
13 maintaining these databases of records, because but for this
14 infrastructure, the records could not exist and could not be used as
15 they are designed, which also goes to the information.

16 MJ: Well, let's -- let me -- do you have any case law
17 supporting this basically value of the database management system and
18 input to value a theft of a copied record, if you would?

19 ATC[CPT von ELTEN]: Could you say the question again, please,
20 ma'am?

21 MJ: Do you -- are -- there any case law that says you can use -
22 - when you -- when you go into a database, you take the records --
23 the United States still has the records -- that you can use the cost

1 of producing the original records as a value system?

2 ATC[CPT von ELTEN]: So the United States' position on that is --
3 is -- is this isn't an example of making a photocopy, because in that
4 case like the photo -- the machinery used to create that record --
5 the photocopy, is what's relevant. And here the infrastructure that
6 supports the record that was made was -- is all the computer systems
7 involved with it.

8 MJ: Is there any case that has held that?

9 ATC[CPT von ELTEN]: The United States has not been able to find
10 any case that discusses valuation for electronic infrastructure.

11 [Pause]

12 ATC[CPT von ELTEN]: Subject to your questions, ma'am.

13 MJ: Well, let's -- I'm still back to your argument that you can
14 use the valuation of the whole database management system. If so,
15 you took -- if you took one SIGACT, that record wouldn't exist either
16 if you didn't have the entire database management system. So do you
17 get to -- do you get to value the entire database management system
18 for the one record?

19 ATC[CPT von ELTEN]: Ma'am, I mean -- those are support -- those
20 are actual costs of producing -- of producing the document. That
21 would be left up to the fact-finder to determine whether that was
22 fair evaluation. But it would be evidence of the cost of the
23 documents production.

1 MJ: So you see -- does the government see a distinction between
2 electronic records and hard copy records? 'Cause I guess the same
3 argument could be made when you're stealing a copy of the FBI manual,
4 that the cost of going into producing the original manual would be --
5 could be used for evaluation of that. Would that be government's
6 position? 'Cause I believe -- is that -- I believe that's the
7 *DiGilio* case -- I could be wrong, but that was an actual photocopy;
8 the Court said we're going to go ahead and use the copy and not got
9 into the information.

10 ATC[CPT von ELTEN]: If -- if the original machinery that had
11 been used to produce that original document had been used to produce
12 the copy, then, yes.

13 MJ: To value the copy would you be able to use the production
14 hours that went into -- okay, so somebody steals a copy of Army
15 Regulation 27-10, do you use the cost of the man-hours that it took
16 for all reviews of all the provisions and all the changes and all of
17 that to actually produce AR 27-10 -- and all the salaries of the JAG
18 officers that went into the 27-10 to value the copy of AR 27-10
19 stolen?

20 ATC[CPT von ELTEN]: I think that's a fair reading of the case
21 law, ma'am.

22 MJ: Okay, and the case law you are relying on is?

23 ATC[CPT von ELTEN]: *Zettl* and *May*, in particular.

1 MJ: Zettl and May. Okay. All right.

2 ATC[CPT von ELTEN]: Thank you.

3 MJ: All right. Defense?

4 CDC[MR. COOMBS]: Yes, Your Honor. So just carrying on with,
5 I guess, what you ended up on the government, we would look to *United*
6 *States v. Jordan* as a good case for the Court to look at. In that
7 case, you're dealing with theft of NCIC records. And the government
8 there did not charge the database; like you stole the NCIC database,
9 they charged theft of the copy of the records. And so when you look
10 at the charge sheet -- or -- excuse me, when you look at the ----

11 MJ: Did they steal a certain amount of NCIC records or all of
12 the NCIC records?

13 CDC[MR. COOMBS]: They stole a certain amount. So when you
14 look at the case, it lays out the actual charge. And so for copies -
15 - 'cause what they did is they printed out copies of NCIC records
16 that were for individuals who were -- who had ongoing cases. And so
17 they wanted to basically give them that information for the benefit
18 of, I guess, their defense.

19 So when they charged copies, they charged as obtaining
20 printouts of criminal records of absentee voters, and then delivered
21 the printouts, which, as property of United States, had a value in
22 excess of \$1000.00. So they charged it as the printouts
23 specifically. When they charged information, they charged it a thing

1 of value of the United States; that is information contained in the
2 NCIC records. And actually I -- the *Jordan* facts are -- it was for a
3 -- printouts of absentee voters, so it actually was contesting an
4 election. But when you look at that, the way you charge it, *Jordan*
5 clearly indicates there's a difference between the actual record and
6 a copy of the record and information within the record. The
7 government says, yeah, a database is electronic, and that -- and so
8 you -- it exists as it does and a copy doesn't make any difference.
9 But that's not true. Because you could have -- like on my computer,
10 I've got a copy of a motion; someone could go on my computer and take
11 it -- actually take that off of my computer to where I no longer have
12 access to it. And that would be taking of the record, what the
13 government actually charged to where ----

14 MJ: How would you take the government -- how would you possibly
15 take the government's database unless you went into all the servers
16 and -- how would you do that?

17 CDC[MR. COOMBS]: Yeah, and that's the problem the
18 government's charging. But, I guess, if -- if they were charging
19 records, like he stole the records, you could go on to the database,
20 download and delete -- download all the information, delete the
21 information to where you have taken it now. To now when somebody
22 goes to the database, there's nothing there. And you see that
23 oftentimes in cases where somebody's, you know, broken into

1 somebody's computer, stole all the information, and then stripped --
2 and then basically deleted their computer to where now when they go
3 into their computer it's not there. They've clearly stolen the
4 actual records in that instance. So that individual can't access --
5 access it anymore. And we look at some of the 641 cases, when they
6 are talking about whether or not the government has been deprived of
7 anything, they say, look, the government never lost the actual
8 records. And all those cases then say, well, okay -- well, yes, but
9 you were charged with a copy of the record. And when you made a copy
10 of the record, you know, that is what is being said is the
11 government's record. So once you made it's a copy -- it's the copy
12 of the record. So that is what was taken and that's what we're
13 valuing. And -- and so in this instance, you know, you need to value
14 what it is, and that's the copy of the record. Now when the
15 government says, well, you can consider the cost of production of the
16 database, as the Court says, if it's one SIGACT, how far back do you
17 go or -- or the 27-10 manual or AR -- regulation -- what do you
18 consider? And if you just took the 27-10, do you considered all the
19 hours of manpower? Well, the government would say, yes. And clearly
20 case law doesn't support that because in every one of these 641
21 cases, when it's a copy, they value the copy. And it's usually the
22 cost of production of the copy.

23 MJ: Is the defense aware of any case involving theft of an

1 entire database or entire electronic record?

2 CDC[MR. COOMBS]: Well -- and, again, I guess, here the --
3 when we say the entire database, it wasn't the entire database. Even
4 at the time that he took it, it wasn't the entire database because
5 the SIGACT database, the GAL database -- I guess maybe the SOUTHCORP
6 database you might be able to say that was all the records within the
7 database because that wasn't updated.

8 MJ: Well, let's talk about each one them; CIDNE-A and CIDNE-I.

9 CDC[MR. COOMBS]: Every day that database changes; additional
10 information gets put on there. And the government offered
11 information to try to narrow down the timeline when he took it
12 because they said we did -- we did shots -- screenshots of -- or not
13 screenshots, but we did forensic research of the last SIGACT that is
14 in the information charged, or the -- excuse me, the copies of the
15 records charged with the -- the time on the actual database of when
16 the next SIGACT was put there. And so we can narrow down the time-
17 group of when he must have taken the copy of the records because it
18 no longer -- it doesn't have this additional SIGACT that fell in a
19 minute later or whatnot. And so that database is constantly growing.
20 He didn't steal the database, obviously, he took copies of the
21 records within the database at a particular time. Same thing with
22 the GAL or both CIDNE-I and CIDNE-A database would be identical;
23 records ----

1 MJ: But at the time he allegedly went in there and took it that
2 was the scope of the database at that time?

3 CDC[MR. COOMBS]: I don't know if you can even say that
4 because the -- he took it up to December 31st and he took it in
5 January, so they were -- they were records that were put in there
6 between the time that he took it. And the reason why that's a cutoff
7 -- the evidence shows you can export SIGACTS by months from Excel.
8 So he exported up to December 31st. So it wasn't even at the time
9 the entire database. And the same thing with, you know, we'll talk
10 about GAL -- I'm -- in fact, I'll just transfer to the GAL argument
11 here, well, but the same thing would be true of the GAL of
12 undoubtedly every day there are email addresses both being added and
13 taken off if it was, in fact, what the government alleges.

14 The government says that, you know, they cited the one case
15 that a map has information and, therefore, you know, that -- that
16 shows you that a photo would be the same, but a map and photo is kind
17 of apples and oranges. And clearly a map has a lot more data in it,
18 just looking at it, than a photo does.

19 MJ: Well, a photo of a sensitive area that nobody's seen,
20 wouldn't that have information that would be valuable?

21 CDC[MR. COOMBS]: Potentially. And -- but see then if it did,
22 then you would see, as in all the 641 cases that did charge
23 information, you would see a charge of that information; as a thing

1 of value.

2 MJ: And which cases should I be looking at?

3 CDC[MR. COOMBS]: The Court should be looking specifically at
4 *Jeter, Jordan and Hubbard* for copying information. And the Court
5 should also look, just as persuasive authority on this issue *DiGilio*,
6 because in *DiGilio* they charged copies. And -- and the Court
7 indicated there that obviously they did not charge theft of
8 information because they would have charged that information under a
9 thing of value. And the government gets up and says, well, you know
10 what, we did -- we included those magic words. We included thing of
11 value. And from that you should have interpreted what we meant was
12 information. But that's not the case because under the defense's
13 view of it, when they charge database, that could be the thing of
14 value that they were alleging. In fact, it was because when you look
15 at the thing of value, what follows immediately thereafter the "to
16 wit" is what they named, and that's the database.

17 MJ: Well, they say "a record or thing of value." So it's the
18 defense's position that means a database?

19 CDC[MR. COOMBS]: Right, because that's what -- that's all
20 that's in the -- the specification. And when you think about it for
21 a moment, if that really was the government's position -- and so many
22 times the government gets up and says, no, there's no case law that
23 supports what we are saying -- or, you know, no one has considered

1 this before; and this is yet another example of that. But this is
2 Trial Counsel 101 of like when you draft the charge sheet, and you
3 lay out the elements, you charge what you intend to prove. And how
4 far ----

5 MJ: Well, what's -- go ahead.

6 CDC[MR. COOMBS]: ---- I'm just going to say, how hard would
7 it have been then if -- if we take them at face value -- that thing
8 of value -- when they were doing that -- when they are looked at it,
9 they interpreted that to mean information? It would have been so
10 easy, especially copying the examples of other 641 cases then, to lay
11 out copies of records from the CIDNE-A database and the information
12 contained therein. That would be notice pleading. That would be
13 pleading the information; the thing of value.

14 MJ: What is your position with respect to the government's
15 position that basically information is inherent in a -- in a record?

16 CDC[MR. COOMBS]: It -- but it's not. And I guess the ----

17 MJ: Or a photo or a map or ----

18 CDC[MR. COOMBS]: Yeah. It's not inherent, for sure, but the
19 -- the key thing is we're dealing with 641. So when you incorporate
20 641 under 134, you take with it the case law. And if that were the
21 case -- if information were inherent, the government's position were
22 correct that, you know, it's the defense that is just not -- is
23 clueless and not understanding the specification, you wouldn't have

1 all these cases that lay out the difference between copies and
2 information. You wouldn't have DiGilio saying, well, obviously the
3 government didn't charge information because they -- they didn't
4 allege it. And you wouldn't have this issue of does information fall
5 under 641 because there would be no dispute, if that were the idea
6 that's inherent in the record, because people would saw, well,
7 clearly records fall under 641; it's named in 641. So there's no
8 dispute. You wouldn't even be arguing the issue of information, but
9 you do. And we have. And it's clear when you look at case law, there
10 is a difference. And so looking at the GAL; the GAL is identical as
11 far as the argument because the government charged the USFI GAL.
12 That's what they specifically charged. And they failed -- first of
13 all, he did steal the USFI GAL. And that's how they actually pled
14 it; the USFI GAL. And they went about trying to prove it in that
15 manner, too, the cost of creating the GAL. But that GAL has never
16 taken from the government's possession. At best, you have .mil
17 addresses that were taken. But they didn't induce any evidence to
18 suggest that the .mil addresses that were found on PFC Manning's
19 computer were, in fact, the USFI GAL; no one said that. In fact,
20 just the opposite; the government's witness, Chief Nixon, who
21 testified on two different occasions -- the first time he testified
22 he said that the USFI GAL contained 160,000 email addresses. And we
23 know that from the evidence that 160,000 email addresses were never

1 on PFC Manning's personal computer. Then when he got up again -- the
2 second time he testified, he said that he viewed the -- .mil
3 addresses and he did not believe that it was the USFI GAL; that, if
4 anything, it might have been Division GAL. And that was his
5 testimony.

6 MJ: Wouldn't it be a lesser included offense?

7 CDC[MR. COOMBS]: Well, the -- the question then would be --
8 and that would be appropriate if we could show the Division GAL would
9 be fall -- would fall under the USFI GAL.

10 MJ: Wasn't there testimony to that effect?

11 CDC[MR. COOMBS]: I don't believe so, ma'am. I believe what
12 he said was each echelon had its own GAL for, you know, lack of a
13 better word, I guess, and the Division GAL didn't necessarily --
14 wouldn't necessarily fall under the USFI GAL. It could. But it --
15 there's no evidence to suggest that it did.

16 MJ: I thought the evidence was it went from the bottom up.

17 CDC[MR. COOMBS]: The evidence was that each -- each person
18 might -- you might have a brigade, you might have a Division, you
19 might have a, in this case, USFI, but there's no evidence that the
20 USFI GAL incorporated all of everything beneath it. All that's been
21 testified to is that there's a -- there's a difference between these
22 things, and one of the things is the Division GAL.

23 And so now you have an identity of property issue. And

1 this goes to the *Wilkins* case, this goes to the *Marshall* case; it's
2 important what you plead. And you pled the USFI GAL, so you need to
3 prove the USFI GAL. And they haven't done that. They haven't done
4 that not only from the standpoint of taking, but they haven't done
5 that from the standpoint of value. And the reason why I wanted to
6 address the GAL separately is, entertaining the government's argument
7 -- let's entertain -- let's say the Division GAL is really what they
8 should have pled -- or maybe they'll argue, well, no, no, it's a part
9 of the USFI GAL. So it's not the entire USFI GAL, but it's a part,
10 and that's what -- you know, that's what we were -- we're pleading.
11 Well, we've had no evidence that the taking was wrongful. Absolutely
12 no evidence to that. In fact, every bit of evidence has been to the
13 contrary. The -- the testimony from Rouillard -- testified that
14 there was no rule -- directive stating that Soldiers were not
15 permitted to access or download .mil addresses from the GAL.
16 Similarly, Chief Balonek testified that there was no prohibition
17 against downloading .mil addresses from any GAL. And the Stipulation
18 of Expected Testimony from Special Agent Williamson stated that the
19 DoD warning banner and legal notice did not explicitly prohibit the
20 downloading of email addresses. I am unaware of any restriction or
21 guidance that precludes one from downloading emails addresses from
22 Outlook. So even viewing in the light most favorably to the
23 government and all reasonable inferences, they haven't proven that

1 the taking -- if there was a taking, was, in fact, wrongful. And we
2 gave the example of this would be no different than as a Judge
3 Advocate, if I decided, you know, I can -- I can go on our kind of
4 global address list. I can pull every email address for every Judge
5 Advocate. And maybe I want to do that. And I want to put it on my
6 computer. Have I then committed a wrongful taking or a larceny or a
7 641 offense if I do that?

8 MJ: Well, what's the defense's position? I mean, there's also
9 been testimony and evidence that this came at the end in May of 2010.
10 So there's been evidence of a pattern of sending -- taking things
11 from the government computers and sending them to WikiLeaks along the
12 way, along with a Tweet. So you have all this happening at the end
13 that could create an influence of wrongfulness. Now the fact that
14 these addresses are on his computer, assuming that that is the case,
15 what is the defense's position on whether a larceny has been proven
16 or anything else?

17 CDC[MR. COOMBS]: Yeah. I think it goes back to -- I believe
18 it was Rouillard, or might have been Nixon that said, well, you know,
19 yeah, there's no prohibition on downloading these emails addresses.
20 I mean -- you could do it -- not a problem, but I guess it -- it was
21 a matter of your intent. I think one of them said it would matter on
22 the intent. And so, I guess, in his mind at least, if you had a bad
23 intent, maybe that would be wrongful, and if you just wanted

1 information, it wouldn't necessarily be wrongful.

2 And so let's look at the evidence that we have. You know,
3 the government's offered this Tweet saying want as many .mil
4 addresses. Well, the .mil addresses that -- once PFC Manning did his
5 research on the GAL, and see if he could export some of the email
6 addresses, what we have information on is there was -- those emails
7 addresses were left on this -- the supply room computer, and there
8 were email addresses in the unallocated space of PFC Manning's
9 personal computer. His personal computer was not wiped or cleaned or
10 anything at all at that point. The forensic evidence shows
11 absolutely no attempt to transfer that to anyone -- give it to
12 anyone. There's been no evidence that there has been any sort of
13 unlawful transfer of that to a person not entitled to receive it.
14 And so the -- the mere possession of it, much like with me, if I
15 wanted to pull down .mil addresses for Judge Advocates, in of itself,
16 according to all the testimony, is not wrongful. It would become
17 wrongful, if at all, if you could show an unlawful transfer of it.
18 And the government hasn't done that. There's been no evidence
19 regarding that. So the defense's position would be that even looking
20 at the evidence related to the Tweet and the research, if you're
21 going to do as inference, another inference that would be just as
22 likely based upon looking at it, is you got a guy who everyone has
23 testified is very computer knowledgeable -- probably the most

1 knowledgeable person on computers that they've ever seen. And he's
2 now removed from his job in the T-SCIF where every day he was doing
3 things for -- as part of his job as an analyst, and he's in the
4 supply room. And the testimony was, you know, he's in this supply
5 room not really doing anything. So you've got a person there who
6 researches can I do something. And then what evidence do we have,
7 you know, he does it so he can show that he can do it, save it on the
8 supply room computer, has it on his personal computer, but then it's
9 deleted. And you can guarantee that the government searched that
10 computer -- and, again, it was not wiped -- the government searched
11 that computer -- if there was an actual -- any evidence to show that
12 it was transferred -- and they have evidence of transfers for
13 everything else with the exception of things that occurred prior to
14 the time that one thing -- the Farrah video that they're alleging
15 occurred in 2009, that you would see that. And so absent some
16 evidence to show that PFC Manning did something with that that would
17 qualify as wrongful, then really all we have is government's own
18 witnesses saying that there's nothing wrong with downloading and
19 saving this information.

20 MJ: Do you have an attempt?

21 CDC[MR. COOMBS]: There again, I think you would have to have
22 some evidence to show the -- the intent to give this to somebody in
23 order for it to be wrongful, again. And -- and there I guess the --

1 the wrongfulness of this would be if we said that because of this
2 property -- and you have it, you can't share it with anyone else. I
3 don't -- the government hasn't offered anything of that except for
4 one witness who said, you know what, in my mind, nothing wrongful
5 with having it; but if you have a bad intent, maybe then it would be
6 wrongful. That's the extent of the evidence we have.

7 MJ: Well, you have regulations that have been judicially
8 noticed as well.

9 CDC[MR. COOMBS]: Right. And -- and in those regulations
10 there's nothing in there that talks about transferring .mil addresses
11 to anyone. The -- the government's position on this is that it
12 becomes wrongful -- and they tried initially to say because it's
13 spearfishing or whatnot for value -- and that goes to the next
14 problem that the government has of valuation. There's been no
15 evidence to -- legitimate evidence to value what actually was
16 allegedly taken in this case. And that would be the copy of the .mil
17 addresses. Again, the government goes back to the database. They
18 want to somehow bootstrap in the overall value of creating the GAL,
19 and -- and then say, well, these are .mil addresses within there, so
20 we can extrapolate from the millions of dollars spent on servers,
21 virtual servers, man-hours and whatnot, that somehow these .mil
22 addresses must have a value more than a thousand. And this is lot
23 like the *Wilson* case where there's been no real evidence on the

1 value. And you have 100 rifles, and they only need to be worth a
2 \$1.39 a piece in order to get over the -- at that time the \$100.00
3 threshold, and yet the government hasn't offered any evidence other
4 than to say ----

5 MJ: What about Mr. Lewis' testimony?

6 CDC[MR. COOMBS]: Yeah, and Mr. Lewis' testimony -- the
7 defense's position on Mr. Lewis' testimony is that -- and I go -- I
8 know for the 917 you don't judge the credibility issues, but Mr.
9 Lewis' testimony on the value of the information would be, in the
10 defense's position, much like *U.S. v. Horning*. And in *U.S. v.*
11 *Horning* ----

12 MJ: Has that case been cited in your brief?

13 CDC[MR. COOMBS]: It has, Your Honor.

14 MJ: Okay.

15 CDC[MR. COOMBS]: And *U.S. v. Horning* the -- the government
16 brought a -- a person that had a book on tools; it was basically a
17 value of tools. And they tried to prove it both how the pawn shop
18 would give certain amount of money for the tools, and then also on
19 the -- a person coming in and testifying from a government book as to
20 the cost of particular tools. And in *Horning* there was a motion to
21 strike that testimony because the person was not a valuation expert;
22 was not somebody who could ascribe a -- appropriate value. And,
23 again, for the 917 purposes, we did make a motion to strike. We'd

1 renew that for the 917 purposes, and we'd that Mr. Lewis, himself,
2 did not consider himself a valuation expert. It wasn't until a week
3 before he testified that that he even knew what he was testifying
4 about. And so from the defense's position there's been no evidence
5 on valuation of what was taken. And that would be, again, a copy of
6 the email addresses. So the cost of production would be the value
7 there. The fees market that Mr. Lewis gave some evidence on -- that
8 would be if there was evidence of -- of that being given to somebody,
9 and then you would have both, maybe, the wrongful and then you could
10 say, okay, well, that was given to somebody and let's prove the value
11 of it. What Mr. Lewis didn't talk about, but what is clear even from
12 the testimony, is that these email addresses are at best were -- or
13 best last a year. We heard from Nixon, that as soon as soon somebody
14 leaves, they -- they pull those email addresses off. So the .mil
15 addresses that the Tweet would be asking for, if -- if there was some
16 sort of need for this for SPAM or for some other unlawful purpose,
17 you wouldn't be asking for .mil addresses that are going to expire
18 within a year for sure, and more than likely the majority of the
19 emails addresses expiring much sooner than that because of how people
20 come in and out of theater. So these are not the .mil addresses. So
21 when the Court's looking for evidence of maybe intent to take, well,
22 the .mil addresses, if you really wanted to take .mil addresses that
23 were of any value, he would go toward the U.S. Army .mil addresses.

1 He wouldn't go towards just the deployed addresses.

2 MJ: Tweet wanted the GAL, right?

3 CDC[MR. COOMBS]: They did not.

4 MJ: They wanted .mil addresses.

5 CDC[MR. COOMBS]: It -- .mil addresses. Yes, Your Honor.

6 MJ: I'm sorry. Okay.

7 CDC[MR. COOMBS]: So you would go towards a, you know, .mil
8 addresses that actually have some value, because all of these emails
9 addresses will expire within a year, for sure. And many of them much
10 sooner than that, because of when the people come in. So even
11 looking at the valuation, Mr. Lewis did not value email addresses
12 that expire within a year -- the deployed email addresses. And so
13 the defense's position is, not only have they charged the wrong
14 thing, not only have they failed to prove that it was wrongful, but
15 they have also not proven valuation. So subject to your questions,
16 ma'am.

17 MJ: I think I have asked them. Thank you.

18 CDC[MR. COOMBS]: Thank you, ma'am.

19 MJ: So what are the three things; not proved MFN -- not proved
20 ----

21 CDC[MR. COOMBS]: So they haven't proved that -- the right
22 thing; they charged USFI GAL. And, if anything, what we have from
23 the testimony it's the Division GAL. And there's no testimony to

1 suggest the Division GAL was part of the USFI GAL. Then they -- they
2 have not proven the actual wrongfulness, if there is, you know, from
3 the standpoint of taking it, if he did, in fact, take say the
4 Division GAL or a portion of the USFI GAL, they haven't proven that
5 was wrong. All their evidence is to the contrary. And then, finally,
6 they haven't proven value of the item that was actually taken.

7 MJ: All right. Thank you.

8 CDC[MR. COOMBS]: Thank you, ma'am.

9 MJ: Captain von Elten?

10 ATC[CPT von ELTEN]: Ma'am, if I may begin by answering your
11 question you asked me last. The United States would differentiate
12 between publications made for public consumption and publications
13 made for the exclusive use of United States government, and would
14 offer that in those cases it's more appropriate to include all the
15 cost of productions where something is made pretty exclusive use of
16 the United States government.

17 MJ: Why?

18 ATC[CPT von ELTEN]: Because if it's photocopying, all those --
19 all the equipment that goes into photocopying is -- like the sole
20 purpose of creating that copy is just to -- just to disseminate it.
21 But in this case where information is created exclusive -- records
22 are created exclusively for the United States government, all that
23 work that goes into it also goes into it, also goes into containing

1 it and to limiting the scope of people who have access to it.

2 MJ: Wouldn't that be true in the NCIC case, too, that was

3 talked about?

4 ATC[CPT von ELTEN]: Which case again was that, ma'am?

5 MJ: The NCIC information for the voter fraud. I don't remember

6 the name of the case. But ----

7 ATC[CPT von ELTEN]: I'll have to go back to you on that case.

8 CDC[MR. COOMBS]: That's the *Jordan* case, Your Honor.

9 MJ: All right. In *Jordan*, the accused converted the NCIC

10 records to his own use. So you're saying anytime the government

11 creates information for itself, you value the entire system that

12 creates it?

13 ATC[CPT von ELTEN]: I'm saying that's some evidence of it.

14 MJ: What's your case -- what's your authority to do that?

15 ATC[CPT von ELTEN]: For the exclusive use?

16 MJ: No.

17 ATC[CPT von ELTEN]: For ----

18 MJ: For the cost of production equipment and maintenance of

19 records in a database, what is -- what other -- any other case law

20 use that valuation?

21 ATC[CPT von ELTEN]: Not other than has been cited before the

22 Court.

23 MJ: Okay, and that would be once again?

1 ATC[CPT von ELTEN]: *Zettl and May* and things like that ----
2 MJ: *Zettl* ----
3 ATC[CPT von ELTEN]: ---- that talk about ----
4 MJ: ---- okay.
5 ATC[CPT von ELTEN]: ---- all the things that go and support it.
6 And, again, the distinction between -- these aren't copies, these are
7 records created from those systems. And it's the systems that create
8 -- create the record that go to its valuation. So if a photocopy is
9 made in the photocopy machine; if it's an electronic record, the
10 infrastructure supporting them.
11 MJ: Well, talk to me about that. The -- is there any authority
12 -- oh, you cited *Morris* -- but is there any authority that digital
13 copies are not copies of records?
14 ATC[CPT von ELTEN]: Ma'am, the United States would have to do --
15 conduct additional research into -- into that. I have -- I've only
16 looked ----
17 MJ: Well, what's the United States position with respect to the
18 defense position that every case that has charged violation of copies
19 has said copies?
20 ATC[CPT von ELTEN]: First, the *Bottone* case did not. It called
21 -- it charged documents when they were copies. And so that's not the
22 -- an accurate reflection. Second, the United States' position is
23 that a lot of those cases ----

1 MJ: What did *Bottone* charge?

2 ATC[CPT von ELTEN]: It charged documents related to cultures.

3 MJ: The copies were -----

4 ATC[CPT von ELTEN]: And they were -- and unlike in this case,
5 the copies were created by the defendants using their own property --
6 like the defendant's own photocopy machine, which is even farther
7 astray than here where the -- all the copies were made using the
8 United States government property.

9 MJ: So it's the government's position then that the copying is
10 method of stealing?

11 ATC[CPT von ELTEN]: It's part of the transaction. By copying --
12 by copying the records -- by creating the records, that the ----

13 MJ: Well, the defense's position is the original records never
14 moved. So a copy was created. What is the government's response to
15 that?

16 ATC[CPT von ELTEN]: Yes. And that copy's created using this
17 infrastructure and then that copy was stolen. And that -- that copy
18 is the United States record. And that record was created with all
19 the computer -- computer infrastructure supporting every --
20 supporting the database. And that -- but for all that infrastructure
21 the copy couldn't be created. Essentially the infrastructure becomes
22 the photocopy machine in that case.

23 MJ: Well, there -- if you're looking at the structure of your

1 charge, that they steal, purloin, or knowingly convert to you use --
2 his use or the use of another, a record or thing of value of the
3 United States or of a department or agency thereof, to wit,
4 Specification 4, the Combined Information Data Network Exchange-Iraq
5 database containing more than 380,000 records. Now the defense's
6 brief and position is, hey, he went in -- he took a copy of it. He
7 never took the original.

8 ATC[CPT von ELTEN]: The United States' position would also be
9 that that could also be read to say that there are 380,000 records
10 from the CIDNE database.

11 MJ: And they all remained in the CIDNE database after PFC ----

12 ATC[CPT von ELTEN]: Not the copies that were transported though,
13 ma'am.

14 MJ: I mean, that's my point. Does the -- the defense is saying
15 you didn't charge copies, you charged originals. What's the
16 government's position on that?

17 ATC[CPT von ELTEN]: Because they're electronic the distinction
18 is -- is -- is rather fine.

19 MJ: Why?

20 ATC[CPT von ELTEN]: Because they can co-exist in different
21 places simultaneously because it's electronic. It's not a paper
22 document that can only exist at one place and one time till it's
23 created. Because it's digital, that -- it's a different -- that the

1 paper cases are different. And that goes to defense's use of
2 *DiGilio*, and the other cases where they talk about -- or *Friedman*,
3 where they talk about photocopies. But, again, those are -- those
4 are things that exist in one place at one time. And -- in *Friedman*,
5 they charge carbon paper because that was the method of transmission.
6 The carbon -- the -- in *Friedman* the defendants took carbon paper and
7 created grand jury transcripts from those. And that was ultimately
8 what was converted was the information -- the contents of the grand
9 jury transcripts. And the source was the carbon paper they provided
10 notice to the source and the method of transmission, which is the
11 same as in this case.

12 MJ: And what case is that?

13 ATC[CPT von ELTEN]: *Friedman*; a 9th Circuit case, ma'am. I can
14 get you a copy.

15 MJ: I have it, I believe. I have it. Are there any other --
16 is there any other case law that makes this distinction between
17 digital copy and hard copy?

18 ATC[CPT von ELTEN]: No, ma'am.

19 MJ: What's the government's position then? Is it required to
20 charge copy and/or information, or is -- why is the charge as is
21 sufficiently -- legally sufficient.

22 ATC[CPT von ELTEN]: The charge is sufficient because it puts the
23 accused on notice of exactly what property was taken, the source of

1 it, and how it was taken because of the electronic nature.

2 MJ: What's the government's position on -- is it required that
3 the -- when someone steals, purloins, or knowingly converts, that the
4 United States has lost the use and benefit of the property?

5 ATC[CPT von ELTEN]: No, Ma'am.

6 MJ: For both a theft and/or -- a stealing and a conversion, or
7 are -- is the standard different?

8 ATC[CPT von ELTEN]: Is the standard different for charging
9 decisions, ma'am?

10 MJ: No, no. For proof.

11 ATC[CPT von ELTEN]: The proof is different for conversion.
12 Where evidence of a theft occurs, that also is evidence of
13 conversion. Where the issue is being -- where it's being charged
14 just for substantial interference, the notice of the property -- the
15 property rights interfered with -- the property itself has to be
16 identified; the specific rights do not need to be enunciated in the
17 charge sheet.

18 MJ: All right, but the government does agree then, at least in
19 accordance with the Court's instruction, that for a conversion, the
20 misuse must have seriously and substantially interfered with U.S.
21 government's property rights?

22 ATC[CPT von ELTEN]: Yes, ma'am. Furthermore, for valuation
23 purposes -- in the *Hood* case in the military jurisprudence, the

1 electronic property at issue -- although those were electronics, like
2 TVs and whatnot, where the inherent qualities were used for valuation
3 there would be most analogous to -- to this case -- and -- thou --
4 market valuation of them.

5 Ma'am, defense talked a little bit about the GAL. The
6 United States would just like to clarify a few things. Special Agent
7 Johnson testified that excerpts of thousands of emails were located
8 on PFC Manning's personal computer. And that personal computer is
9 evidence of transfer. That transfer was from the exclusive
10 possession of United States government outside of that to PFC
11 Manning's personal possession. And at that point, given that
12 transfer, the theft is complete. Defense also ----

13 MJ: Whoa, whoa, whoa. I hear you with the classified
14 information; the GAL's not classified.

15 ATC[CPT von ELTEN]: No, ma'am.

16 MJ: And the evidence has shown that -- the testimony we have is
17 that there was no prohibition on downloading the GAL to your personal
18 computer or anything else. So why is the theft complete if it's on
19 his computer?

20 ATC[CPT von ELTEN]: Chief Nixon talked about -- testified about
21 the access a user had. He differentiated between visibility and
22 access; and he said users had visibility. And he testified that
23 visibility meant that you could go onto your computer and you could

1 populate the list -- you could see it, but he also testified you
2 didn't have access to export that ability -- to export that
3 information. You didn't have the ability to take it and -- take it
4 for your personal use. He also testified that ----

5 MJ: Wait a minute, he -- you mean as a matter of policy or as a
6 matter of ability?

7 ATC[CPT von ELTEN]: As a matter of ability.

8 MJ: So Nixon's test -- Chief Nixon's testimony was you would
9 have to do some sort of manipulation of computer to actually do this?

10 ATC[CPT von ELTEN]: Yes, ma'am. And the evidence supports that
11 as well. As defense just noted, PFC Manning conducted research on
12 how to defeat these mechanisms so that he could, as he put it in his
13 tasker, exfiltrate the GAL.

14 MJ: So tell me about this -- as Chief Nixon says that you can't
15 download .mil addresses?

16 ATC[CPT von ELTEN]: Yes. He talks about the difference between
17 access and visibility. And he says a user has visibility. A user
18 can go onto a computer and see a -- you know, and see the list as it
19 gets populated by the various mechanisms from that organization
20 level. But he testified he didn't have the access. He said you
21 could cut and paste it, but that would be -- you could physically cut
22 and paste it, but that would be a tedious and ineffective process,
23 akin to using Wget bypassing the mechanisms. And then PFC Manning

1 conducted research to do that, and so he could exfiltrate it to his
2 personal computer.

3 MJ: Was there any policy that said -- or anything that was
4 brought out in the government's case in chief that said that users
5 could not download the GAL or portions of the GAL to their personal
6 computer?

7 ATC[CPT von ELTEN]: One second, ma'am.

8 [Pause]

9 ATC[CPT von ELTEN]: Ma'am, Chief Rouillard testified about the
10 importance of keeping that information safe and the potential
11 malicious uses for that. Furthermore, when the -- the test ----

12 MJ: Well, that's not what I asked. I asked is there any
13 prohibition on someone downloading .mil addresses to their personal
14 computer? There is for classified information; I understand that,
15 but for the GAL?

16 ATC[CPT von ELTEN]: All the testimony talked about the
17 acceptable use being -- taking emails and placing them within your
18 NIPR or your government computer. There was no testimony saying it
19 was -- that I'm aware that said it was permissible to take email
20 addresses and place them on your personal computer.

21 MJ: Well, the government's got the burden of proof here. Is
22 any testimony that it's impermissible to put it on your personal
23 computer -- or evidence?

1 ATC[CPT von ELTEN]: Your Honor, it would be -- Your Honor, the
2 evidence would be that it's not in accordance with Army policy such
3 as 25-2, that -- where information is supposed to be -- information
4 assurance dictates that's supposed to be not misused; that it's
5 supposed to be used for appropriate uses would be some evidence of
6 that.

7 MJ: Well, government, ----

8 ATC[CPT von ELTEN]: And, also, that ----

9 MJ: ---- go ahead.

10 ATC[CPT von ELTEN]: ---- that testimony was also about the ----
11 specifically that PII should not be compromised or widely
12 disseminated. And PII, especially of Soldiers should be protected.

13 MJ: All right, government, by close of business tomorrow, you
14 find me what the record says or that -- what has been in the
15 government's case in chief, presented as evidence, that there is some
16 sort of policy or prohibition that people cannot take -- download the
17 GAL onto their personal computers.

18 ATC[CPT von ELTEN]: Yes, ma'am.

19 MJ: Or .mil addresses.

20 ATC[CPT von ELTEN]: Also, ma'am, Chief Nixon testified that the
21 user names remain the same. So while the entire email address might
22 change after a year when someone redeployed, the domain -- the domain
23 part would change, but the user name would remain the same as Chief

1 Rouillard testified and Chief -- that the user name is valuable
2 information and subject to misuse.

3 Finally, the defense cites the *Horning* case, which is also
4 not on point in this case. In *Horning* the issue was the government
5 only presented evidence that the properties were \$50.00 not the
6 statutory minimum of \$100.00. And the fact-finder was not allowed to
7 infer, without additional information, that the \$50.00 value was too
8 low. So in that case, the government presented evidence that the
9 pawnbroker paid \$50.00 for it, and then argued that everybody knows
10 pawnbrokers underpay for things and they're worth more than the pay.
11 So the government didn't present evidence how much more somebody
12 would pay, and because of that, they weren't allowed to make that
13 argument. And in this case the United States has presented evidence
14 of well in excess of \$1000.00 in different means and modes.

15 [Pause]

16 MJ: Assume I find that -- well, assume -- well, just assume for
17 sake of argument that there is no prohibition against downloading
18 email addresses to a personal computer that has been proven, does the
19 government believe there's an attempt?

20 ATC[CPT von ELTEN]: Yes, ma'am, absolutely.

21 MJ: Why?

22 ATC[CPT von ELTEN]: Because in this case where PFC Manning has a
23 prolonged and demonstrated pattern of compromising information to

1 WikiLeaks, WikiLeaks puts out a Tweet asking for the email addresses,
2 and shortly thereafter in that time span, PFC Manning, for no
3 apparent reason other than -- creates a tasker saying he wants to
4 exfiltrate the military addresses, does so, takes them to his
5 personal computer. Furthermore, in the exfiltration tasker PFC
6 Manning created also referred -- if I'm not mistaken -- to CIDNE in
7 that document, which is evidence that this tasker had been used
8 before, and was used when he wanted to exfiltrate and compromise the
9 government information.

10 MJ: This exfiltration tasker, what -- where did the testimony
11 come from or what exhibit is it in?

12 ATC[CPT von ELTEN]: PE 122, ma'am.

13 ATC[CPT MORROW]: Testimony of Mr. Johnson, Your Honor.

14 ATC[CPT von ELTEN]: Subject to your questions, ma'am.

15 MJ: No. I think I have asked them. Thank you.

16 ATC[CPT von ELTEN]: Thank you.

17 MJ: Any final words, Mr. Coombs? It's your motion.

18 CDC[MR. COOMBS]: Yes, Your Honor. Just to start off with point
19 of a clarification; the -- the case cited by the government, the
20 *Bottone* case, I believe, when the Court looks at that, you'll see
21 it's not a 641 case.

22 MJ: But isn't it referred to by *DiGilio* in positive terms?

23 CDC[MR. COOMBS]: Yes, but as far as being 641, defense's

1 position is when you look at those cases, they do, in fact, require
2 you to specifically plead the property. And the reason why that's
3 important obviously is for the notice, but the Court looks also at
4 the *Zettl* case, a 4th Circuit case, and it also kind of shows the
5 difference between how you plead it, and how you value it. In *Zettl*,
6 you've got a Navy Defense Appropriation book that was copied. And
7 they proved the value by the cost price of the photocopying, the
8 transportation of that record, and the actual cost of the record.
9 But when you -- when you look at what was not allowed in that case
10 that's important. The defense wanted to get access to the
11 information. They wanted to be able to bring out the information
12 within the record. And the Court said ----

13 MJ: To bring out what information -- what -- the information in
14 the book?

15 CDC[MR. COOMBS]: Yes, Your Honor. And the Court said the
16 content was irrelevant because information was not charged. And so
17 in that case the defense was trying in discovery to get access to the
18 information within the -- the charge copy and the Court denied that
19 reading in a difference between copy and information.

20 MJ: Did they say information not charged, or information not
21 used to determine value?

22 CDC[MR. COOMBS]: Not charged, ma'am. So -- and that would be
23 why the defense would say that there's -- there is a difference

1 between record, copy record, and information under 641. And the
2 Zettl case highlights that.

3 MJ: What's the defense's position with respect to the
4 government position that there's a distinction between a digital copy
5 and hard copy -- that a digital copy isn't really a copy?

6 CDC[MR. COOMBS]: Well, no, I'd agree that there's a
7 distinction between a digital copy and hard copy. And -- and all
8 cases bear that out, that the copy of the record can be a record in
9 and of itself because it's a copy, and that's how you would charge
10 it; you -- a photocopy of the record or whatnot. So there -- I would
11 disagree that there's no distinction between the original and a copy
12 because it's somehow digital. There is a difference. And -- and
13 that would be important not only for the charging and valuing, but
14 also, depending upon the theory you go under for either the stealing
15 or the wrongful appropriation because certainly the wrongful
16 appropriation there is difference.

17 MJ: Well, there's no wrongful appropriation in 641.

18 CDC[MR. COOMBS]: I'm mean -- excuse me, I'm sorry, conversion
19 is what I meant to say. If the theory was conversion -- let's just
20 take the stealing out of it -- but the government just charged these
21 records under a theory of conversion, there -- there would be no way
22 they could argue there is no difference between digital and a copy
23 because we would all agree that if you still had a copy of it there's

1 -- you know, there's no conversion of it at that point.

2 MJ: I'm not following this.

3 CDC[MR. COOMBS]: Yeah. So if you had -- so if the government
4 just went forward on a theory of conversion --

5 MJ: Yes.

6 CDC[MR. COOMBS]: And -- and they were -- they're trying to
7 prove substantial interference, if they still have the copy of
8 whatever it is -- so let's take it out of the classified realm for a
9 moment, and let's just simply say whatever copy -- kind of like the
10 Zettl case, you've got the Defense Appropriation book, and a copy of
11 it, and you've never been denied the original possession of it, and
12 testimony, like in this case, has come forward, saying, oh, we use
13 the book same way, it hasn't changed at all how we use it, there
14 would be no substantial interference. And the government couldn't
15 argue that there's -- there's no difference between the original and
16 additional copy. Now the copy of it, when you actually charge the
17 copy, then you can argue a substantial interference because now the
18 case law does bear out that when you make a copy of a government
19 record, that's still the government's property even though it's --
20 you've made the copy. And you can have a substantial interference
21 with that, but that's not what the government has proven here. And
22 that kind of goes back to -- at least when it comes to 641 offenses,
23 the Supreme Court in *Morissette*, did say, I'll quote it now, "that

1 probably every stealing is a conversion, but certainly not every
2 known conversion is a stealing." And from the defense's position
3 then at a minimum the government would have to prove substantial and
4 serious interference regardless of how they go forward.

5 Then just with -- on the GAL for a moment. The -- the
6 government is saying -- I guess now their theory is, okay, well, you
7 had the wrongfulness when you put it on your personal computer. And
8 the Court's tasked them to find something on that. But I think also
9 just the common sense ways and ways of the world right now -- like if
10 you go on your personal computer, you can get on AKO (Army Knowledge
11 On-line), you can get on JAGCNET, you can get access to email
12 addresses, are they saying that you can't save email addresses on
13 your personal computer when you can access that information on your
14 personal computer? And -- and so that kind of undercuts that -- that
15 kind of argument that somehow by putting it on the personal computer,
16 that that was wrongful.

17 MJ: Well, if you can access something on your personal
18 computer, like AKO, and access the addresses, why does that
19 necessarily preclude a regulatory prohibition on downloading those
20 addresses to your personal computer?

21 CDC[MR. COOMBS]: It wouldn't. And so if you had that
22 regulation that said, hey, you can't do that; it's wrongful, and
23 there's some reason why -- perhaps if the government offered that

1 evidence. But when we look back at really what Rouillard testified
2 to, what the Balonek testified to, and what's in the Stip of Expected
3 Testimony for Williamson, they all have the same statements; there
4 was no prohibition on the downloading and saving of these email
5 addresses. That's the government's evidence. And so, when you --
6 when you see what's there then they almost kind of -- or now arguing
7 some sort of quasi-1030 argument for these offenses of -- because you
8 -- you did have the ability to cut-and-paste. I mean, I think what
9 my opposing counsel said was, you could cut-and-paste but that would
10 be a tedious process. But if you actually used, you know, the export
11 function that he figured out that he figured out, that does it so
12 much faster. So apparently speed at which you do something, in the
13 government's eyes, makes it wrongful then for a 641 offense. That
14 shouldn't work for the 1030 offense, and that certainly should not
15 work for the 641 offense.

16 MJ: Well, we'll have to see what the government presents here.
17 But assume -- I guess, in order to exceed authorized access, if you
18 will, you're on your personal computer, you're going to, I assume, a
19 NIPR site to get these -- this information.

20 CDC[MR. COOMBS]: Yes, Your Honor.

21 MJ: So there would have to be some sort of evidence that the --
22 there's some sort of prohibition on executable files or a programs or
23 something like that to access the NIPR site.

1 CDC[MR. COOMBS]: Right. You know -- yeah, so if you're
2 carrying that 1030 argument and applying it to this, then, yes, you
3 have to have something to say that when you access this -- again, if
4 you're using the 1030 logic, that by doing it in a quicker way than -
5 - than you could do otherwise by cut and paste, that that's somehow
6 now wrongful. But there's been no evidence to suggest that. And, in
7 fact, the evidence to the contrary; it's just -- you can do it. And
8 the only person who testified about potential wrongfulness was the
9 person who said, well, it depends on your intent.

10 MJ: Well, I said I was going to disregard all that, too.

11 CDC[MR. COOMBS]: Okay. Well, and that intent goes towards,
12 again, maybe second part of the Court's questions was, well, could
13 you have an attempt? And -- and then it would be important then to
14 prove a specific intent to commit the offense. And ----

15 MJ: And it would, and a substantial step.

16 CDC[MR. COOMBS]: Yeah, and the overt act -- the substantial
17 step to accomplish that. And, you know, the government points to,
18 okay, he's got these other disclosures, kind of the spillover effect
19 to try to prove this offense. But -- let's run with that spillover
20 for a moment. You've got these other disclosures, and we can show
21 'em -- because we've got computer forensics to show 'em -- everything
22 but the one that he's saying he didn't do, and that's the Farah
23 video. Of course, he's saying he gave them videos, but at a later

1 date. So ----

2 MJ: Well, he's not saying anything for purposes of this ----

3 CDC[MR. COOMBS]: That is correct; he's not saying anything
4 for purposes of this motion or for this case actually at this point.
5 He attempted to say that that -- going back with the attempt. But
6 here the fact that you have the forensics to show that, well, here
7 what do we have forensically? We show that he put the information on
8 his computer and then deleted it; it's in the unallocated space, and
9 no evidence of -- of giving it to anyone. So the evidence actually
10 undercuts any argument of an attempt.

11 MJ: The forensics for the other charged offenses that were
12 conducted prior, were they in the deleted or unallocated files?

13 CDC[MR. COOMBS]: Um, not -- I don't know well enough to tell
14 you that, ma'am. I'm sorry.

15 MJ: That's okay. It's not your burden.

16 CDC[MR. COOMBS]: Yes, ma'am, I'll run with that. It's not my
17 burden. So I -- I mean, I think when you look at -- at this in
18 totality, the government has all the issues that the defense argued
19 in its motion with regards to the GAL.

20 MJ: Thank you.

21 CDC[MR. COOMBS]: Than you, Your Honor.

22 MJ: Government, I'll ask you the same question; with respect to
23 the prior charged offenses before the GAL, do the forensics indicate

1 whether the res, if you will, was in the deleted or unallocated
2 files?

3 ATC[CPT von ELTEN]: Yes, they do, Your Honor. Not with ----

4 MJ: For all of them?

5 ATC[CPT von ELTEN]: ---- respect to the CIDNE, because that
6 happened prior to the wiping of the computer, but with respect to
7 the Department of State cables, yes.

8 TC[MAJ FEIN]: Your Honor, may I have a moment.

9 MJ: Yes.

10 [Pause]

11 ATC[CPT MORROW]: Ma'am could you please reask the question?

12 MJ: Yes. The defense's position is basically -- is -- is -- or
13 one of the arguments has been that the forensics show that the GAL
14 was in the deleted files, I believe, on the Mac, and on the Peter
15 Bigelow account in the supply room. Now the government's position
16 has been -- again, we're arguing the attempt piece now -- that the
17 fact that they are in the deleted -- the fact that they're in the
18 deleted files doesn't make any difference because there's been a
19 pattern -- an ongoing pattern of disclosures. So I'm asking on prior
20 disclosures, the things that you found, the Department of State
21 cables, SOUTCHCOM, CIDNE, were they found in deleted and unallocated
22 files, too?

23 ATC[CPT MORROW]: Yes, Your Honor.

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

- a. Errata sheet, if any.
- b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
- c. Record of proceedings in court, including Article 39(a) sessions, if any.
- d. Authentication sheet, followed by certificate of correction, if any.
- e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
- f. Exhibits admitted in evidence.
- g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
- h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.